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Supreme Court of the United States

OCTOBER TERM, 1955

No. 507

LEE WALKER, APPELLANT,

vs.

CITY OF HUTCHINSON, RENO COUNTY, KANSAS, A MUNICIPAL CORPORATION, HAL EVERETT, CITY MANAGER OF SAID CITY, JOHN OLSON, MAYOR AND MEMBER OF THE CITY COMMISSION OF SAID CITY, ET AL.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS

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[fol. 1]

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 39782

LEE WALKER, Appellant,

vs.

CITY OF HUTCHINSON, RENO COUNTY, KANSAS, a Municipal Corporation; T. E. Chenoweth, City Manager of Said City; Robert G. King, Mayor and Member of the City Commission of Said City; Charles N. Brown, Jerry Stremel, R. C. Woodard, and C. E. Johnson, Members of the City Commission of Said City, Appellees

Appeal from the District Court of Reno County, Kansas
Hon. John Fontron, Judge.

Abstract of Appellant

STATEMENT

This is an action by a property owner to permanently enjoin and restrain the City of Hutchinson from entering or trespassing on Plaintiff's property.

The action raises the constitutionality of G.S. 26-202 which pretends to vest in a city the right to condemn real estate without notice to the property owner.

The Trial Court held the statute constitutional. This appeal is taken therefrom.

[fol. 2] IN DISTRICT COURT OF RENO COUNTY, KANSAS

AMENDED PETITION

Comes now Lee Walker, the plaintiff herein, by his attorneys, Oswald & Mitchell, and for his cause of action against the City of Hutchinson, Reno County, Kansas, T. E. Chenoweth, City Manager, Robert G. King, Mayor and Members of the City Commission, Charles N. Brown, Jerry Stremel, R. C. Woodward and C. E. Johnson, Members of the City

Commission, all of the City of Hutchinson, Reno County, Kansas, respectfully states to the Court:

2. That the Plaintiff is a resident of Hutchinson, Reno County, Kansas, and that his post office address is 907 East 11th Street, Hutchinson, Kansas; that he is a Negro; that he was born in Bargtown, Kentucky on the 15th day of October, 1875, and that he had, as a youth, an education equivalent to the Sixth Grade.

3. That Defendant City of Hutchinson, Reno County, Kansas is a municipal corporation; that the above named individual Defendants are respectively T. E. Chenoweth, City Manager, Robert G. King, Mayor and a member of the City Commission, Charles N. Brown, Jerry Stremel, R. C. Woodard and C. E. Johnson, members of the City Commission, all of the City of Hutchinson.

4. That on or about the 27th day of February, 1905, the Plaintiff acquired fee simple title through a Warranty Deed, duly executed by one Arthur Walker, which deed was duly recorded with the Register of Deeds of Reno County, Kansas, on the 28th day of February, 1905, in Book 85, Page 479, to the following described real estate, all situated in Reno County, Kansas:

> Lots thirty-seven (37), thirty-eight (38), thirty-nine (39), forty (40), forty-one (41), forty-two (42), forty-three (43), forty-four (44), forty-five (45), forty-six (46), forty-seven (47) and forty-eight (48), Block Five (5), Maple Grove Addition to the City of Hutchinson,

[fol. 3] and ever since that time, the Plaintiff has owned same, enjoyed quiet and peaceful possession thereof and likewise has had and enjoyed all the fruits of such ownership, and has paid, from time to time, all assessments and taxes of every kind and nature legally assessed against said real estate; that he is therefore now the legal and equitable owner of said real estate.

5. That on or about the 12th day of April, 1954, the defendant City of Hutchinson, through its duly elected or appointed, qualified and acting officials, filed an action in the District Court of Reno County, Kansas, entitled:

> In the matter of the application of the city of Hutchinson, Kansas, a municipal corporation, for the ap-

pointment of commissioners in the matter of the condemnation of property for the acquisition of right of way for the opening, widening and extending of portions of Eleventh Avenue, Harrison Street and Twenty-third Avenue in the city of Hutchinson, Kansas,

the same being docketed as Case No. 7867.

6. That said action was for the purpose of taking from the Plaintiff and condemning certain portions of the above described real estate, as a by-pass, so to speak, for Hutchinson's Super-Sports Arena.

7. That the Plaintiff has never been, at any time, notified in any manner that the City of Hutchinson coveted the bit of real estate as a by-pass to Hutchinson's Super-Sports Arena he has owned since 1905; nor has he ever been served with any summons, nor given any other personal notice of any kind whatsoever that said defendant City of Hutchinson had filed the aforesaid action for the purpose of taking a part of his said real estate.

[fol. 4] 8. That the pretended right of defendant City of Hutchinson to the real estate above legally described, owned by the Plaintiff, rests upon the authority, so far as this Plaintiff and counsel have been able to ascertain, of G.S. 26-201 and 26-202, and Reno County, Kansas District Court Case No. 7867, more fully described in Paragraph 5 herein, brought thereunder, which statute or statutes are void and of no force and effect whatsoever, because same attempt to vest the power in certain municipalities to take property without due process of law.

9. That the only notice to an owner of real property, which G.S. 26-201 and 26-202 requires is by publication, which is not sufficient notice under the above mentioned due process clauses of both Federal and State Constitutions.

10. That the Plaintiff had no actual notice, and did not actually know, or have any reason to know that Defendants sought to condemn and take his land, until approximately the middle part of August, 1954; unless by a peculiar quirk of the imagination, it can be said that the single legal publication, published just once in The Hutchinson News-Herald, and that on the 14th day of April, 1954, gave him notice; that said single notice so published in the official newspaper

was not sufficient notice to satisfy the requirements of the Due Process clauses of both Federal and State Constitutions.

11. That at the present moment defendant City of Hutchinson, either itself, or by contractors employed by it, is, or is threatening to enter upon said real estate owned by the Plaintiff, and this for the purpose of building a highway across said real estate, all in utter and complete disregard of the rights of this Plaintiff.

12. That the Plaintiff is entitled to an Order of this Court instanter, enjoining and restraining defendant City of Hutchinson from entering upon, or in any manner trespassing upon said real estate, for the reason, inter alia, that [fol. 5] there is no other remedy, either at law or in equity, open to the Plaintiff; that if said defendant City of Hutchinson is not so restrained and enjoined, the Plaintiff will suffer irreparable damage by reason thereof.

13. That the Plaintiff is advised that in some orders by Courts of competent jurisdiction, in the granting of a restraining order, or temporary injunction of this nature, the party seeking same, and obtaining same, is required to post certain indemnity or other type of bond or bonds; that the Plaintiff hereby respectfully and humbly advises the Court that by reason of his limited financial resources, he cannot post such a bond, and therefore asks, upon the above and foregoing statement of facts, that the Court does not make the giving of such a bond or bonds as a condition precedent to Plaintiff's obtaining a restraining order or temporary injunction at this time.

14. That by reason of the above and foregoing facts, the Plaintiff is entitled to have, and desires to have a permanent injunction against defendant City of Hutchinson, restraining and enjoining it, and its servants, agents and all others in its employment, from entering or trespassing upon the Plaintiff's real estate, above described, or preventing him from otherwise enjoying the quiet and peaceful enjoyment thereof.

Wherefore and by reason of the foregoing, the Plaintiff prays for an immediate Order of this Court restraining and enjoining defendant City of Hutchinson from entering or trespassing upon the Plaintiff's real estate, above described,

and the Plaintiff further prays for a judgment of this Court permanently enjoining and restraining the City of Hutchinson from entering or trespassing upon Plaintiff's real estate, above described; and Plaintiff further prays for judgment for his costs herein, and for such other and further [fol. 6] relief as to this Court seem just and equitable.

/S./ A. Lewis Oswald, for Oswald & Mitchell, Attorneys for the Plaintiff.

Duly sworn to by Lee Walker, jurat omitted in printing.

In District Court of Reno County

Answer

Come now the defendants, and for answer to the petition of plaintiff filed herein, deny each and every, all and singular, the allegations of plaintiff's petition, except those hereinafter explained, admitted or modified.

Defendants admit the allegations contained in paragraphs numbered 2, 3, and 5 of plaintiff's petition, and defendants further admit that the right of eminent domain exercised by the defendant City of Hutchinson, Kansas, is based upon the provisions of G.S. 1949, 26-201 and 26-202, as well as upon other statutes; that Reno County District Court Case No. 7867 was for the purpose, among other things, of condemning a portion of plaintiff's property for a public street in [fol. 7] the City of Hutchinson, Kansas; that said statute G.S. 1949, 26-202, provides for notice by publication in the official city paper in condemnation proceedings such as the one here involved and that such a notice was published on April 14, 1954, in the Hutchinson News-Herald, the official city paper, which fully described the portion of plaintiff's property being condemned for street purposes, such description being that set forth in paragraph 16 of plaintiff's petition.

For further answer to plaintiff's petition, defendants allege and state:

1. That said publication of notice in the Hutchinson News-Herald on April 14, 1954, specifically named the

plaintiff therein and described the portion of his property being condemned, and was published more than ten days prior to April 27, 1954, the date set forth in said notice for the meeting of the commissioners for the assessment of damages, all as provided by G. S. 1949, 26-202. A copy of said notice is hereto attached, marked Exhibit "A", and made a part hereof as of fully set forth herein.

2. That the said notice by publication, as provided by G. S. 1949, 26-202, is sufficient notice under the due process of law clause of both the United States and Kansas Constitutions, and that G. S. 1949, 26-201 and 26-202, are valid and constitutional statutes, and that the procedure followed by the defendant City of Hutchinson, Kansas thereunder in condemning the aforesaid portion of plaintiff's property for a public street in said City is authorized by said statutes and is therefore valid and legal.

Wherefore, defendants demand judgment that plaintiff take naught by his suit, and for the costs herein.

(S.) Fred Littooy, City Attorney, Attorney for Defendants.

[fol. 8] EXHIBIT "A" TO ANSWER

IN THE DISTRICT COURT OF RENO COUNTY, KANSAS

No. 7867

In the Matter of the Application of the CITY OF HUTCHINSON, KANSAS, a Municipal Corporation for the Appointment of Commissioners in the Matter of the Condemnation of Property for the Acquisition of Right of Way for the Opening, Widening and Extending of Portions of Eleventh Avenue, Harrison Street and Twenty-Third Avenue in the City of Hutchinson, Kansas

Notice of Condemnation

To Patrick J. O'Farrell, Agatha O'Farrell, Jennie Mueller, Kenneth D. Gitchell, Myrtle Gitchell, J. O. Gitchell, Nellie B. Gitchell, Everett S. Cole, Nina M. Cole, Nellie Gitchell, Pearl D. Graham, The Railroad Building, Loan and Savings Association, H. K. Gordon, Virginia Dean Gordon, V. W. Cochran, Anita Cochran, Roy Freeman, J. W. Wood, Opal O. Wood, Fred W. Gilbert, Fern Gilbert, First Federal Savings and Loan Association of Hutchinson, Oblate and Company, Lee Walker, Gladys G. Whitford, Claude M. Reed, Anna Edna Reed, M. M. Hays, Ruth J. Hayes, Herbert K. Harrison, Theresa R. Harrison, W. C. Wilde, and All Other Persons Concerned:

Public notice is hereby given as required by law that an Application has been made to the Judge of the District Court of Reno County, Kansas, by the City of Hutchinson, [fol. 9] Kansas, a municipal corporation and a city of the first class of Reno County, Kansas, requesting said Judge of the said District Court of Reno County, Kansas, to appoint three commissioners to make an appraisement of the value of the land taken and an assessment of the damages caused to the owners thereof by the condemnation of the following-described real property under and by virtue of the statutory authority of Article 2, Chapter 26, General Statutes of Kansas, 1949, and amendments thereto, to wit:

Tract 1. Commencing at the Northwest corner of Lot 48, Block 5, Maple Grove Addition to Hutchinson, Kansas, for

place of beginning, thence south 80 feet, thence northeast to the northeast corner of Lot 41, Block 5, Maple Grove Addition, thence west to place of beginning.

Tract 2. Commencing 845 feet east of the southwest corner of the Northeast Quarter of Section 7, Township 23 South, Range 5 West of the 6th P. M. for place of beginning, thence north 30 feet, thence east 50 feet, thence south 30 feet, thence west 50 feet to place of beginning.

Tract 3. Commencing 895 feet east of the southwest corner of the Northeast Quarter of Section 7, Township 23 South, Range 5 West of the 6th P. M. for place of beginning, thence north 30 feet, thence east 50 feet, thence south 30 feet, thence west 50 feet to place of beginning.

Tract 4. Commencing 945 feet east of the southwest corner of the Northeast Quarter (NE/4) of Section 7, Township 23 South, Range 5 West of the 6th P. M. for place of beginning, thence north 30 feet, thence east 100 feet, [fol. 10] thence south 30 feet, thence west 100 feet to place of beginning.

Tract 5. Commencing 30 feet west of the southeast corner of the Northeast Quarter of Section 7, Township 23 South, Range 5 West of the 6th P. M., Reno County, Kansas, for place of beginning, thence west 231 feet, thence south 30 feet, thence east 231 feet, thence north 30 feet to place of beginning.

Tract 6. West 25 feet of the north 116 feet of a tract commencing at the northeast corner of Lot 1, Block 18, Chapman's Addition to Hutchinson, Kansas, for place of beginning, thence north 185 feet, thence west 111 feet, thence south 185 feet, thence east 111 feet to place of beginning.

Tract 7. West 25 feet of the south 69 feet of a tract commencing at the northeast corner of Lot 1, Block 18, Chapman's Addition to Hutchinson, Kansas, for place of beginning, thence north 185 feet, thence west 111 feet, thence south 185 feet, thence east 111 feet to place of beginning.

Tract 8. East 19.5 feet of a tract commencing at the northwest corner of Lot 3, Block 17, Chapman's Addition to Hutchinson, Kansas, for place of beginning, thence north 185 feet, thence east 119.5 feet, thence south 185 feet, thence west 119.5 feet to place of beginning.

Tract 9. North 92½ feet of the west 5.5 feet of the east

25 feet of a tract commencing at the northwest corner of Lot 3, Block 17, Chapman's Addition to Hutchinson, Kansas, for place of beginning, thence north 185 feet, thence east 119.5 feet, thence south 185 feet, thence west 119.5 feet to place of beginning.

[fol. 11] Tract 10. South 92½ feet of the west 5.5 feet of the east 25 feet of a tract commencing at the northwest corner of Lot 3, Block 17, Chapman's Addition to Hutchinson, Kansas, for place of beginning, thence north 185 feet, thence east 119.5 feet, thence south 185 feet, thence west 119.5 feet to place of beginning.

Tract 11. Commencing at the southeast corner of the Northeast Quarter of Section 2, Township 23 South, Range 6 West for place of beginning, thence west on the south line of said Northeast Quarter 276 feet, thence north 13.65 feet, thence east to a point on the east line of said Northeast Quarter that is 20 feet north of place of beginning, thence south 20 feet to place of beginning, except the east 33 feet of said tract.

Tract 12. Commencing at the southeast corner of the Northeast Quarter of Section 2, Township 23 South, Range 6 West, thence west on the south line of said Northeast Quarter 276 feet for place of beginning, thence continuing west 85 feet, thence north 11.8 feet, thence east to a point that is 13.65 feet north of the south line of the said Northeast Quarter and 276 feet west of the east line of the said Northeast Quarter, thence south 13.65 feet to place of beginning.

Tract 13. Commencing at the southeast corner of the Northeast Quarter of Section 2, Township 23 South, Range 6 West, thence west on the south line of the said Northeast Quarter 361 feet to place of beginning, thence continuing west 191 feet, thence north 7.25 feet, thence east to a point that is 11.8 feet north of the south line of the said Northeast [fol. 12] Quarter and 361 feet west of the east line of the said Northeast Quarter, thence south 11.8 feet to place of beginning.

Tract 14. Commencing at the southeast corner of the Northeast Quarter of Section 2, Township 23 South, Range 6 West, thence west on south line of said Northeast Quarter 552 feet for place of beginning, thence continuing west

to a point that is 646.11 feet east of the southwest corner of the Southeast Quarter of the said Northeast Quarter, thence north 5.6 feet, thence east to a point that is 7.25 feet north of the south line of said Northeast Quarter and 552 feet west of the east line of the said Northeast Quarter, thence south 7.25 feet to place of beginning, all of the above-described real estate being situated in the City of Hutchinson, Reno County, Kansas, and all of said land to be used by the said City of Hutchinson, Kansas, for public streets, all as is provided by law.

The said Judge of the said District Court of Reno County, Kansas, did on the 12th day of April, 1954, duly appoint the undersigned as such commissioners, and we have duly qualified as required by law.

Now, therefore, public notice is hereby given as required by G. S. 1949, 26-202, and amendments thereto, that we, as said commissioners, will meet at the office of the City Engineer, located in the Convention Hall in the City of Hutchinson, Kansas, on the 27th day of April, 1954, at 9:30 A. M. of said day, then and there to commence and proceed with the duties imposed upon us as required by law.

[fol. 13] Dated at Hutchinson, Kansas, this 12th day of April, 1954.

O. L. Miller, Phil Sames, Mont Hilleary.

Published April 14, 1954, in the Hutchinson News-Herald.

IN DISTRICT COURT OF RENO COUNTY

REPLY

Comes Now, Lee Walker, the plaintiff in the above captioned suit, by Oswald & Mitchell, his attorneys, and for reply to the Answer filed herein admits the material facts pleaded therein, but denies, of course, the legal conclusions set forth therein, namely that G. S. 26-201 and 26-202 do not violate the due process clauses of the Federal and State Constitutions, which the Plaintiff challenges in this cause of action.

(S.) A. Lewis Oswald, for Oswald & Mitchell, Attorneys for the Plaintiff.

In District Court of Reno County

Memorandum Opinion

Plaintiff's application for a temporary injunction was heard on October 4th. At the conclusion of the hearing, counsel requested that, to eliminate the need of further trial, the case be placed at issue immediately and that decision then be rendered on plaintiff's prayer for a permanent injunction, based on the pleadings, and considering the proceedings of October 4th as having been had on a hearing for permanent injunction. By agreement of counsel, defendants' motion to strike was thereupon sustained, after which plaintiff filed his amended petition. The defendants have filed their answer, and the plaintiff, his reply. The case is now at issue and decision will be as to the issuance of a permanent injunction.

[fol. 14] At the outset it must be borne in mind that the inquiry in this matter must be directed to the constitutionality of Section 26-202 as it pertains to the facts of this case and whether plaintiff has been deprived of his property without due process of law by reason of the notice given thereunder, rather than to the wisdom of the legislature in passing the statute or the expediency of action by the City pursuant thereto. Whether the statute was wisely enacted and whether sound public policy should dictate the giving of different or additional notice are matters that must be addressed to the legislative rather than to the judicial branch of government, always provided of course that the statute does not contravene constitutional provisions.

The statute involved in this action provides, so far as herein pertinent, that the condemnation commissioners shall give owners and lien holders of the property condemned at least 10 days notice in writing of the time and place when and where the damage will be assessed, *or* by one publication in the official city paper. This statute first appeared as Section 2, of Chapter 86, Laws of 1913, in which it was provided that the commissioners give at least 10 days' notice in writing by one publication in the official city paper. The 1913 law was revised in 1923 and appeared in its present form in the Revised Statutes of 1923. It has undergone no material change since then.

It is plaintiff's contention that the notice provided for by said statute is unconstitutional, particularly as it pertains to resident land owners, because it provides for notice by publication rather than by personal service. However, the general rule appears to be that personal service of a notice of this kind is not required by those constitutional provisions that prohibit the taking of property without due process of law. In Section 1534, McQuillan on Municipal Corporations, the rule is thus stated:

> [fol. 15] "It is almost universally held, however, that notice by publication or posting is sufficient, even with respect to persons residing within the jurisdiction where the proceedings are pending."

The same rule is set out in 20 CJ 938, wherein it is said:

> "'Personal notice to the owner is not a constitutional prerequisite to the validity of condemnation proceedings, and it is competent for the legislature to provide for constructive notice by publication.'"

In the case of State of Georgia v. City of Chattanooga, 264 U. S. 472; 44 Sup. Ct. 369; 68 Law Ed. 796, the United States Supreme Court, speaking on page 800, says:

> "Personal service upon the owner is not essential; publication of notice is sufficient."

This rule was approved and followed in the cases of Newman, et al. v. Lynchburg Investment Corporation, 236 U. S. 692; 35 Sup. Ct. 477, 59 Law Ed. 792, and Ballard v. Hunter, 204 U. S. 254; 51 Law Ed. 461. And in the case of North Laramie Land Company v. Hoffman, 268 U. S. 283; 69 Law Ed. 953, the court says:

> "All persons are charged with knowledge of the provisions of statutes, and must take note of the procedure adopted by them, and when that procedure is not unreasonable or arbitrary, there are no constitutional limitations relieving them from conforming to it. This is especially the case with respect to those statutes relating to the taxation or condemnation of land. Such statutes are universally in force and are

general in their application,—facts of which the landowner must take account in providing for the management of his property and safeguarding his interest in it. Owners of real estate may so order their affairs that [fol. 16] they may be informed of tax or condemnation proceedings of which there is published notice, and the law may be framed in recognition of that fact. In consequence, it has been uniformly held that statutes providing for taxation or condemnation of land may adopt a procedure, summary in character, and that notice of such proceedings may be indirect, provided only that the period of notice of the initiation of proceedings and the method of giving it are reasonably adapted to the nature of the proceedings and their subject matter, and afford to the property owner reasonable opportunity, at some stage of the proceedings, to protect his property from an arbitrary or unjust appropriation."

One of the latest expressions of the United States Supreme Court is found in the case of Anderson National Bank v. Luckett, 321 U. S. 233; 64 Law Ed. 599, in which the court upheld notice given to bank depositors by posting a report on the courthouse door or bulletin board as being sufficient to satisfy the requirements of due process of law. In discussing the question, the court says, on page 605:

"All persons having property located within the state and subject to its dominion must take note of its statutes affecting the control or disposition of such property and other procedure which they set up for those purposes (citing authorities). Proceedings for the assessment of taxes, the condemnation of land, the establishment of highways and public improvements affecting landowners are familiar examples."

Cases from several states are found in support of this rule of law, and reference is here made to a few of them. In the case of Henritzy v. Harrison County (Miss.), 178 So. 322, the county had condemned land without any notice and thereafter published notice advising land owners to file their [fol. 17] claims for compensation within 30 days. This

procedure was held valid, and the court, in its discussion, said:

> "In the case of Stewart v. Hinds County, 25 Miss. 479, the point was made by the owner of the land that he could not be bound by the condemnation proceedings without being first personally served with notice, he being a resident of the state. But the court held that notice in such case may be either actual or constructive, and particularly so in a case like this (condemnation for highways) which is a proceeding in rem and not in personam." . . . "We believe the present case is strictly a proceeding in rem, in which the order of the court is conclusive, whether the party had notice of the proceeding or not."

The case of Nishnabotna v. Drainage District (Mo.), 55 SW 276, was one in which the court upheld a statute that authorized the institution of condemnation proceedings by the publication of notice against owners regardless of their residence. On page 277, the court says:

> "That the legislature had the right to prescribe the manner of giving notice in such cases there can be no question, provided always that it be reasonable."

The statute involved in the case required a 15 days' notice and notice was actually given for 19 days, in three publications. In the case of Ryan v. Housing Authority of the City of Newark, 15 Atl. 2647, the Supreme Court of the State of New Jersey held that notice of the proceedings may be indirect. See also, Great Northern R. Co. v. Minneapolis, 136 Minn. 1, 161 N. W. 231; Taylor v. Emmet Co. Drainage Dist., 167 Iowa 42, 148 N. W. 1040; Wulzen v. San Francisco, 101 Cal. 15, 35 Pac. 353.

The case of Winnebago Furniture Manufacturing Company v. Wisconsin Railway Company, 51 N. W. 576, ap- [fol. 18] pears to be quite in point. In that case the Wisconsin statute provided for alternative methods of giving notice, either by publication or by personal service, and the court, in upholding the statute, says:

> "The statute provides that notice 'may be served personally or at the last and usual abode of such

owners and parties interested not less than five days before such hearing, or by publication in some newspaper, to be designated by said court or judge, not less than ten days before the date set for hearing such petition.' The statute undoubtedly gives the petitioner the right to give notice in either of the methods specified, and by publication on resident as well as non-resident owners in case the court or a judge thereof shall so provide in the order. There is no constitutional requirement that we are aware of which prevents notice from being given by publication. Mr. Lewis, in his work on Eminent Domain, Section 367, says, 'In regard to the kind of notice which will satisfy the requirements of the constitution in proceedings to take land for public use, the authorities almost universally hold that notice by publication or posting is sufficient, even with respect to persons residing within the jurisdiction where the proceedings are pending'."

It is to be noted that the statute involved in this case is very similar to the one under consideration since the alternative methods of giving notice are the same and the length of time required is identical.

Admittedly, there are authorities which hold to the contrary. The Supreme Court of Michigan in the case of Knudinger v. City of Saginaw, 26 N. W. 364, declared invalid a city ordinance which made no provision for personal service of a notice upon resident owners in cases where such service was feasible. Likewise, the Supreme Court of the State of Washington, in the case of Smith, et [fol. 19] al v. Cochrane, (Wash.), 37 P. 311, held that personal notice was necessary in case of resident landowners and that the requirements of due process were not fulfilled when publication service only was had upon them. However, in this latter case the court recognizes that its holding is against the weight of authority and says, on page 312:

"Returning to the question of notice, there is no doubt that the prevailing number of cases, and perhaps the weight of authority, the country over, is that in condemnation cases the legislature has the power to

prescribe the kind of notice, whether personal or constructive, which shall be given to property owners, resident or nonresident. Lewis, Em. Dom. Sec. 367; Brown, Jr., Sec. 172; Elliott, Roads & S., pp. 152, 153."

Two Wisconsin cases are also cited in support of the doctrine enunciated in the last two cases but both cases were decided prior to the case of Winnebago Furniture Company v. Wisconsin Railway Company, supra, and both were overruled by the later case.

Although the Supreme Court of Kansas has never passed upon the constitutionality of Section 26-202, or the validity of the provision for notice, nevertheless it has had occasion to discuss and pass upon similar questions relating to notice in connection with other condemnation statutes. The early case of Hunt v. Smith, 9 Kan. 137, was an action to enjoin certain individuals from appropriating land for a railroad right of way and to recover damages for trespass upon such land. The defense interposed was that the land had been condemned, but plaintiff contended that the condemnation proceedings were invalid because of defective notice. Section 49 of the pertinent law then in effect required that personal notice be served upon actual occupants of the land, while Section 86 provided for notice by newspaper publica- [fol. 20] tion generally. The plaintiff alleged he was a resident of the state, was in actual possession of the land, looking after and caring for the same, but did not actually reside thereon, although having keys to the house and stables. The court held that plaintiff was not an actual occupant of the land, although he was the owner, and that the service upon him by publication was valid. The court says on Page 145:

"An owner of land is not in the actual occupancy of the same within the meaning of Section 49 of the act concerning private corporations, unless he is an actual resident thereon; and where such owner is not an actual occupant of the land, notice of the appropriation of a part of the same for a right of way for a railroad given by publication in a newspaper as provided by Amended Section 86 of such act, is sufficient."

The case of Missouri River F. S. & G. R. Company v. Shepard, 9 Kan. 647, was brought against the railroad company to recover damages for trespass and involves the same Section 86 referred to in the Hunt case. The railroad company had condemned certain land but the plaintiff, who was the owner and in possession of the land concerned, claimed that the proceedings were invalid for the reason that no map and profile had been filed before notice was given and that therefore there was no actual notice. The court first discussed the question of filing the map and profile and concluded that it need not be done before publishing notice. Then, turning to the question of notice, the court says on page 654:

"Is the law unconstitutional because providing for no notice? If the law was silent as to notice, and an attempt was made by it to divest one of his property without any pretense of notice, its unconstitutionality would be undisputed. A man cannot be deprived of his property without due process of law. This process [fol. 21] of law implies notice; not necessarily actual, personal notice, but notice; such that there is a reasonable probability of the party's receiving it." . . . "Article 9 is not obnoxious to the charge of attempting to divest property without notice. It attempts to provide for notice. It requires notice, gives opportunity to be heard and defend, and right of appeal from the decision of the commissioners to the district court. The real objection, therefore, is that the notice provided for is insufficient. Section 86 of this article reads, that 'before any board of county commissioners shall proceed to lay off any railroad route as herein provided, notice of the time when the same shall be commenced shall be given by publication, thirty days before the time fixed, in some newspaper published in such county,' etc. This does not contemplate personal notice. Nor is this essential. As we understand the learned counsel for defendant in error, they concede this. The statutes are full of instances of constructive notice, as in cases of publication against non-residents, in attachment suits, foreclosures of mortgages, etc.; or in cases of changes in the valuation of real estate by the boards

of equalization; or in the matter of street improvements in cities, or opening roads in the country."

This language is peculiarly appropriate to the case at bar and has never been criticized by the Supreme Court in any subsequent decision. It appears just as valid today as it was when uttered many years ago.

The provisions concerning notice by publication contained in this same Section 86 were upheld by the Supreme Court of the United States in the case of Huling v. Kaw Valley Railway and Improvement Company, 130 U. S. 559, 32 Law Ed. 1045. Although in this case the land owner was a non-resident of the state, and the precise question involved was the validity of the service as it pertained to such an owner, [fol. 22] no distinction seems to have been made, in much of the language used, between residents and non-residents. On page 563 the court, in discussing the propriety of publication notice, states:

> "Nor have we any doubt that this form of warning owners of property to appear and defend their interest, where it is subject to demands for public use when authorized by statute, is sufficient to subject the property to the action by the tribunals appointed by proper authority to determine those matters."

A more recent Kansas case, which is illuminating, is that of Harrison v. Newman, et al, 71 Kan. 324, which upheld a notice by publication given in condemnation proceedings. The statute provided for the appointment of appraisers who should have at least three days' notice in the official paper of the time and place of their meeting for the assessment of damages and benefits. The court held that condemnation proceedings conducted under this statute and in pursuance of such notice was valid. In the syllabus the law of the case is set out as follows:

> "The notice required by section 160 of the act relating to cities of the first class (Laws 1903, ch. 122) to be given by the appraisers appointed to assess damages and benefits incident to the opening of an alley is a substitute for the notice required by section 161a of the same act to be given by the appraisers appointed

to assess damages in condemnation proceedings generally."

"A requirement that at least three days' notice in the official city paper shall be given of the meeting of the appraisers in condemnation proceedings is satisfied by the publication of a notice in one issue of such paper nine days before the time set."

[fol. 23] In view of the Kansas cases cited above, none of which have been disapproved or overruled in any way, it appears to me that the question as to the validity of notice by publication cannot at this time be considered an open one in Kansas. The pronouncements of the Supreme Court concerning the notice required in condemnation matters appears definitely to be in accord with the generally accepted rule prevailing in this country.

But it is also contended the statute is invalid for the further reason that the length of notice required is but 10 days and that but one publication thereof is required. Parenthetically it may here be noted that the notice was actually published 13 days prior to the meeting of the condemnation commissioners. Perusal of cases involving the question of notice discloses a variety of statutory provisions as to requirements for length of time and number of publications, ranging from the three days and one publication involved in Harrison v. Newman, supra, to the thirty days' notice required by the statute construed in Hunt v. Smith, supra, and Missouri River F. S. & G. R. Company v. Shepard, supra. In the Wisconsin case before cited the length of time was 10 days and the number of publications, one. Statutes construed in other cases cited herein provide for notices of 10, 15, 20 and 30 days, with the number of publications varying in each instance with the length of the notice. From a consideration of all the cases examined I cannot conclude that the provisions for notice contained in Section 26-202 are so unreasonable as to violate the due process clause of the constitution.

In view of what has been said above, and the authorities there cited, it must be held that the section under consideration is constitutional and that, since it is conceded that the City acted pursuant to such statute and complied with its

requirements, plaintiff has not been deprived of his property without due process of law.

[fol. 24] In arriving at this conclusion the Court does not intend to express an opinion as to the wisdom of the statutory requirement, nor to indicate any personal approval of the form or type of notice given in these condemnation proceedings. Such matters are not within the judicial prerogative.

In accordance with the views expressed herein the plaintiff's prayer for a permanent injunction will be denied as of the 1st day of November, 1954.

John Fontron, District Judge.

IN DISTRICT COURT OF RENO COUNTY

JOURNAL ENTRY—October 4, 1954

Now on this 4th day of October, 1954, the same being a regular day of the September term of said court for said year, the above-entitled action comes on for hearing and trial; the plaintiff being present in person and by his attorneys, Oswald & Mitchell, and the defendants being present by their attorneys, Fred C. Littooy, City Attorney, and Bill R. Cole, Assistant City Attorney.

Thereupon, the hearing of plaintiff's application for a temporary injunction is proceeded with before the court without a jury, and plaintiff introduced his evidence in support of his petition for a temporary injunction and rested.

Thereupon, it was stipulated in open court by the attorneys for plaintiff and defendants that in order to eliminate the need for further trial and hearing, the case be placed at issue on plaintiff's petition for a permanent injunction immediately and that a decision be rendered on plaintiff's prayer for a permanent injunction, such decision to be based on the pleadings as finally formed, and on the evidence introduced on this date. It was further stipulated by the parties hereto that briefs be submitted on or before October 6, 1954.

[fol. 25] Thereupon, defendants filed a Motion to Strike, which motion was sustained by the court on October 7, 1954.

Thereupon, plaintiff filed an amended petition herein, defendants filed an Answer, and plaintiff filed his Reply.

Briefs were submitted by both plaintiff and defendants, and the court took the matter under advisement.

Thereupon, on this 1st day of November, 1954, the same being a regular day of the September term of said court of said year, the above-entitled matter being at issue and the pleadings formed, the court, having examined the briefs and pleadings filed herein, having heard the evidence introduced on October 4, 1954, and being fully advised in all of the premises, finds that the allegations contained in defendants' Answer are true; that Section 26-202 of the General Statutes of Kansas, 1949, is constitutional; that the defendant, City of Hutchinson, acted pursuant to such statute and complied with its requirements with respect to condemning a portion of plaintiff's property for a public street in said City, and that the plaintiff has not been deprived of his property without due process of law by reason of such statute and the defendant City of Hutchinson's condemnation proceedings conducted thereunder.

It is, therefore, by the court considered, ordered, adjudged and decreed that the restraining order heretofore issued herein against the defendants be and the same is hereby vacated and dissolved; that the plaintiff's prayer for a temporary injunction and for a permanent injunction be and the same is hereby denied, and that judgment be and the same is hereby rendered in favor of the defendants and against the plaintiff.

[fol. 26] It is further considered, ordered, adjudged and decreed that the plaintiff pay the costs of this action.

(S.) John Fontron, District Judge.

Approved: (S.) A. Lewis Oswald, for Oswald & Mitchell, Attorneys for Plaintiff. (S.) Fred Littooy, City Attorney, Attorney for Defendants.

In District Court of Reno County

Notice of Appeal to the Supreme Court of the State of Kansas—November 30, 1954

To defendants City of Hutchinson, Reno County, Kansas, a municipal corporation; T. E. Chenoweth, City Manager of said City; Robert G. King, Mayor and member of the City Commission of said City; Charles N. Brown, Jerry Stramel, R. C. Woodard and C. E. Johnson, members of the City Commission of said City; and Fred C. Littooy and Bill R. Cole, their attorneys of record:

You and each of you are hereby notified that the Plaintiff herein hereby appeals to the Supreme Court of the State of Kansas from a certain judgment rendered herein by the above named Court, namely, by the District Court of Reno County, Kansas:

Said judgment being evidenced by the Journal Entry filed herein on the 4th day of October, 1954, in which said Trial Court held that Section 26-202 of the General Statutes of Kansas, 1949, is constitutional; that defendant the City [fol. 27] of Hutchinson acted pursuant to such statute and complied with its requirement with respect to condemning a portion of Plaintiff's property for a public street in said City, and that the Plaintiff has not been deprived of his property without due process of law by reason of such statute, and the defendant City of Hutchinson's condemnation proceedings conducted thereunder; that the Plaintiff's prayer for a temporary injunction and for a permanent injunction be and the same is hereby denied; that judgment be and the same is hereby rendered in favor of the Defendants and against the Plaintiff.

Dated at Hutchinson, Kansas, this 30th day of November, 1954.

(S.) A. Lewis Oswald, for Oswald, Mitchell & Thiessen, Attorneys for the Plaintiff.

Acknowledgment of Service of the Above and Foregoing Notice of Appeal (Omitted in Printing)

[fol. 28] CERTIFICATE TO ABSTRACT (Omitted in Printing)

IN DISTRICT COURT OF RENO COUNTY

SPECIFICATIONS OF ERROR

The Court erred in denying to Plaintiff a permanent injunction against the City of Hutchinson, enjoining and restraining it from entering or trespassing on Plaintiff's real estate; and that Court further erred by holding G. S. 26-202 constitutional; that said 26-202 does not provide sufficient notice to the Plaintiff to satisfy the requirements of the Due Process clauses of both Federal and State Constitutions.

[fol. 29] IN THE SUPREME COURT OF THE STATE OF KANSAS

[Title omitted]

Appealed from the District Court of Reno County, Kansas

Honorable John Fontron, Judge

Counter-Abstract of Appellees

STATEMENT

Commencing on page 6 of Appellant's Abstract is shown the purported Answer filed by the Appellees in this case. [fol. 30] This was actually the Answer intended to be filed in answer to Appellant's original Petition. However, when Appellees' Motion to Strike was sustained, Appellant filed an Amended Petition, and the Answer shown in Appellant's Abstract was never filed and is not a part of the pleadings in this case. This discrepancy has since been pointed out to the attorneys for Appellant, who agree that said Answer shown in Appellant's Abstract was never filed in said case by Appellees, but that the following is the true and correct Answer filed therein:

IN DISTRICT COURT OF RENO COUNTY

ANSWER

Come now the defendants, and for answer to the amended petition of plaintiff filed herein, deny each and every, all and singular, the allegations of plaintiff's amended petition, except those hereinafter explained, admitted or modified.

Defendants admit the allegations contained in paragraphs numbered 2, 3 and 5 of plaintiff's petition, and defendants further admit that the right of eminent domain exercised by the defendant City of Hutchinson, Kansas, is based upon the provisions of G. S. 1949, 26-201 and 26-202, as well as upon other statutes; that Reno County District Court Case No. 7867 was for the purpose, among other things, of condemning a portion of plaintiff's property for a public street in the City of Hutchinson, Kansas; that said statute G. S. 1949, 26-202, provides for notice by one publication in the official city paper in condemnation proceedings such as the one here involved and that such a notice was published on April 14, 1954, in the Hutchinson News-Herald, the official city paper.

For further answer to plaintiff's petition, the defendants allege and state:

[fol. 31] 1. That said publication of notice in the Hutchinson News-Herald, the official city paper of the City of Hutchinson, Kansas, on April 14, 1954, was given by the commissioners duly appointed by the Judge of the District Court of Reno County, Kansas, in Case No. 7867, in the manner prescribed by G. S. 1949, 26-202, and contained all the information required by said statute; that said notice specifically named this plaintitff and described the portion of his property being condemned for a public street, and was published more than ten days prior to April 27, 1954, the date set forth in said notice for the meeting of the said commissioners appointed in said District Court Case No. 7867 for the assessment of damages and appraisal of the value of the land taken, all as provided by G. S. 1949, 26-202.

2. That the said notice by publication, as provided by G. S. 1949, 26-202, is sufficient notice under the due process

clauses of both the United States and Kansas Constitutions, and that G. S. 1949, 26-201 and 26-202, are valid and constitutional statutes and that the procedure followed by the defendant City of Hutchinson, Kansas, thereunder in condemning the aforesaid portion of plaintiff's property for a public street in said City is authorized by said statutes and is therefore valid and legal.

Wherefore, defendants demand judgment that plaintiff take naught by his suit and for the costs herein.

(S.) F. C. Littooy, City Attorney, Attorney for Defendants.

Duly sworn to by F. C. Littooy. Jurat omitted in printing.

[fol. 32] Certificate to Counter-Abstract (Omitted in Printing)

[fol. 33] In Supreme Court of Kansas

No. 39,782

Lee Walker, Appellant,

v.

City of Hutchinson, Reno County, Kansas, a Municipal Corporation; T. E. Chenoweth, City Manager of Said City; Robert G. King, Mayor and Member of the City Commission of Said City; Charles N. Brown, Jerry Stremel, R. C. Woodward and C. E. Johnson, Members of the City Commission of Said City, Appellees

Syllabus by the Court

Eminent Domain—Publication Notice—Constitutionality of Statute. In an action to enjoin a city from entering upon real estate taken by it under a proceeding in eminent domain, the record is examined, and it is held, that G. S. 1949, 26-202,

which provides that the commissioners appointed by the judge of the district court shall give any owner of the property sought to be taken ten days' notice by publication in the official city paper that at the time fixed by such notice the commissioners will appraise the value of the lands taken and assess the other damages done to the owners of such property, does not deprive such owner of due process of law and is not unconstitutional.

Appeal from Reno District Court; John Fontron, Judge.
Opinion Filed June 11, 1955. Affirmed

A. Lewis Oswald, of Hutchinson, argued the cause, and William L. Mitchell, and Patrick H. Thiessen, both of Hutchinson, were with him on the brief for the appellant.

Fred C. Littooy, City Attorney of Hutchinson, argued the cause, and Bill R. Cole, Assistant City Attorney of Hutchinson, was with him on the brief for appellees.

OPINION—June 11, 1955

The opinion of the court was delivered by

THIELE, J.:

This was an action in which the plaintitff Lee Walker sought an injunction against the defendant city to prevent an alleged trespass on his real estate. The relief sought was denied by the trial court and plaintiff has appealed.

Insofar as need be noticed plaintiff alleged that he owned certain described real estate in the city of Hutchinson and [fol. 34] that on April 12, 1954, the city, by its officials, commenced proceedings in the district court to condemn property for the acquisition of right-of-way for opening, widening and extending portions of named streets in the city; that plaintiff had never been notified in any manner that the city desired his real estate nor had he ever been served with summons nor given any personal notice that the city had filed the proceeding for the purpose of taking a part of his real estate; that the pretended right of the city to take the real estate owned by the plaintiff rested upon the authority of G. S. 1949, 26-201 and 26-202, which statutes are void and of no force because they attempt to vest the power in the

city to take property without due process of law; that the only notice to an owner of real estate, under those statutes, is by publication and is not sufficient under the due process clauses of the United States constitution and the state constitution; that plaintiff had no actual notice or any reason to know the city sought to condemn and take his real estate until the middle of August, 1954, unless it can be said the single legal publication, published once in a named newspaper gave him notice, and that such single published notice was not sufficient to satisfy the requirements of the due process clauses of the above constitutions. It was further alleged that the city was entering upon plaintiff's real estate for the purpose of building a highway across it, all in disregard of plaintiff's rights and that he was entitled to an order enjoining the city from so doing, and he prayed accordingly.

The gist of the defendant's answer was that the city was proceeding under the above statutes, and that it instituted proceedings in eminent domain and that the commissioners appointed by the judge of the district court gave notice by publication in the manner prescribed by G. S. 1949, 26-202 which notice specifically named the plaintiff, described the portion of his real estate being condemned for a public street and which notice was published more than ten days prior to April 27, 1954, the date set forth in the notice for the meeting of the commissioners for assessment of damages and appraisal of the lands taken; that the notice by publication and the procedure followed was authorized by the above statutes and was legal and valid. Attached to the answer was a copy of the notice published in the Hutchinson News-Herald, the official city paper, on April 14, 1954, which shows that notice of condemnation was given to Lee Walker and others that an application had been made re- [fol. 35] questing the district judge of Reno county to appoint commissioners to make an appraisement of lands taken under and by virtue of G. S. 1949, Ch. 26, Art. 2, and describing fourteen tracts of land in the city and that the judge had appointed three commissioners who would meet at a specified place on April 27, 1954, then and there to commence and proceed with the duties imposed upon them by law.

The plaintiff's reply admitted the material facts pleaded and denied the legal conclusion that the mentioned statutes did not violate constitutional provisions as to due process.

Details of the trial need not be noted. The trial court prepared a memorandum decision which covered rather fully the questions of constitutionality. The journal entry of judgment discloses the trial court heard the evidence, examined the pleadings and briefs filed and on November 1, 1954, found that G.S. 1949, 26-202 was constitutional; that the city of Hutchinson acted pursuant to it; that plaintiff had not been deprived of his property without due process of law and it denied plaintiff the relief for which he prayed and rendered judgment for the defendants.

The plaintiff perfected his appeal specifying as error that the trial court erred in holding G.S. 1949, 26-202 constitutional and in denying the injunction sought.

The question of constitutionality turns on the first sentence of the last mentioned statute, which reads:

"The commissioners appointed by the judge of the district court shall give any owner and any lienholder of record of the property sought to be taken at least ten days' notice in writing of the time and place when and where the damage will be assessed, or by one publication in the official city paper, and at the time fixed by such notice shall, upon actual view, appraise the value of the lands taken and assess the other damages done to the owners of such property, respectively, by such appropriations."

For purposes of information we note the above statute was amended by the legislature in 1955 by the enactment of Senate Bill No. 313.

In his brief the appellant first directs attention to and quotes from 12 Am. Jur. 267, where it is stated that the elements of due process of law are notice, and an opportunity to be heard and to defend; that it is a rule as old as the law that no one shall be personally bound until he has been duly cited to appear and has been afforded an opportunity to be heard, and that a judgment without such citation and opportunity lacks all the attributes of a judicial determination [fol. 36] and is never to be upheld. Appellant then directs attention to the statute as quoted above and to the fact that

it provides two methods for giving notice, one by at least ten days' notice in writing, the other by one publication in the official city paper, and he contends that the first method is fair and the second method unfair. It is here pointed out that he does not contend that if the second method was proper, what was done by the city did not fully meet the statutory requirement. In expanding his argument appellant stresses his age, his education and the length of time he had owned his real estate; that the three branches of the government, executive, legislative and judicial, have a duty to uphold the constitution and that it may not be amiss to consider how such an unconstitutional act was ever made part of the statutes; that in fairness the city should have given him personal notice and should not have followed the provision for publication notice; that the statute provided a right way and a wrong way and the "wrong way" violated his constitutional rights to due process. There is no specific argument that a statute providing for notice by publication in a proceeding to condemn lands in the exercise of the right of eminent domain is unconstitutional as depriving the owner of due process of law, and except for the reference to 12 Am. Jur. 267, there is no citation of any authority in support of the argument made. In such a case we might follow the rule that where, in connection with a contention of error by the trial court, no citation is made of authorities in support, this court may well conclude that counsel, after diligent search, has not been able to find any, and affirm the judgment. (*McCoy* v. *Fleming*, 153 Kan. 780, 113 P. 2d 1074.)

In our opinion, however, the trial court did not err. In view of the question presented we need pay no attention to the provision for personal service, for none was had. The question is whether a statute which provides for publication service of notice, as was had, deprives the owner of real estate of his property without due process of law.

Our approach to the problem of constitutionality, or lack of it, is governed by the oft recognized rule that all presumptions are that the statute is constitutionally valid and before the court can declare it invalid it must clearly appear to be unconstitutional. (See *Hartman* v. *State Commission of Revenue and Taxation*, 164 Kan. 67, 70, 187 P. 2d 939;

Miller v. *Jackson*, 166 Kan. 141, 143, 199 P. 2d 513; *Board of Education of School District No. 1* v. *Robb*, 168 Kan. 368, [fol. 37] 369, 212 P. 2d 306, and cases cited therein.) We also bear in mind that the general rule is that proceedings to exercise the right of eminent domain are in rem and not in personam (29 C.J.S. 1129, 18 Am. Jur. 738, McQuillin on Municipal Corporations, Vol. 11, pg. 531, and *Todd* v. *Atchison, T. & S. F. Rly. Co.*, 134 Kan. 459, 7 P. 2d 79, and cases cited).

Although stated in varying language, in many of the texts and encyclopedias treating of notice in condemnation proceedings the rule almost universally followed is that where the statute does not preclude its application, notice by publication is sufficient and satisfies the constitutional requirement, even with respect to persons residing within the jurisdiction where the proceedings are pending. See Lewis on Eminent Domain, Third Edition, pg. 1010, § 568; Randolph on Eminent Domain, pg. 306, § 337; Nichols on Eminent Domain, Vol. I, pg. 339, McQuillin on Municipal Corporations, Vol. 11, pg. 549; 18 Am. Jur. pg. 967; and 29 C. J. S. pg. 1217.

In Merrill on Notice, Vol 1, pg. 510, § 518 (published in 1952) it is said:

"Assuming notification to be necessary, there is much liberality in the decisions as to the methods which, consistently with due process, may be employed. Save in isolated instances which hardly serve to mark exceptions to the general rule, personal notification is not regarded as an essential element of the 'law of the land,' unless a personal liability is to be enforced against one not otherwise subject to the 'jurisdiction'. The hallowing effect of time seems the chief factor in judicial willingness to accede to the employment of methods which can be regarded as likely actually to result in knowledge only upon the assumption that the noticee, exercising the highest degree of care to determine whether any monition has been given, will carry his search into the highways and byways. Another factor, no doubt, is the expedition of public business resultant upon sustaining such arrangements.

"Thus it comes about that public posting, eminently inefficient as a source of information under modern conditions, is

accepted as consistent with due process of law in drainage, paving, and irrigation proceedings. Publication, a whit more dependable, but still a very precarious way of spreading the news, has received judicial approval in numerous instances, including: special assessment proceedings; proceedings to organize irrigation or drainage districts; the assessment, equalization, and enforcement of taxes; eminent domain proceedings; land registration proceedings; and the process of administrative tribunals. The place of printing the newspaper in which a notice affecting realty is published has been held immaterial, the important thing being publication within the locality wherein the land affected lies. Publication within the limits of the principal city in a water district has been adjudged due process as to owners of land outside the city limits but within the boundaries of the district.

[fol. 38] "Naturally combinations such as posting and publishing, or mailing and publishing, or a choice between either of two constitutionally permissible notifications, as posting or publishing, will pass muster."

In *Winnebago Furniture Mfg. Co. vs. The Wisconsin Midland R. Co.*, 81 Wis. 389, 51 N. W. 576, the court considered the sufficiency of a notice arising under a statute similar to ours and held, in part, that:

". . . The statute provides that notice 'may be served personally or at the last and usual abode of such owners and parties interested, not less than five days before such hearing, or by publication in some newspaper to be designated by said court or judge, not less than ten days before the date fixed for the hearing of such petition.' The statute undoubtedly gives the petitioner the right to give notice in either of the methods specified, and by publication on resident as well as nonresident owners, in case the court or a judge thereof shall so provide in the order. There is no constitutional requirement that we are aware of which prevents notice from being given by publication. . . ." (l. c. 394)

Georgia v. Chattanooga, 264 U. S. 472, 44 S. Ct. 369, 68 L. Ed. 796, involved condemnation of lands for railroad purposes. The facts need not be detailed. In the course of the opinion it was said the taking was a legislative and not

a judicial function and an opportunity to be heard in advance need not be given, and further, that personal service on the owner was not essential; that publication of notice was sufficient.

In *North Laramie Land Co. v. Hoffman*, 268 U. S. 276, 45 S. Ct. 491, 69 L. Ed. 953, the court considered an appeal from the judgment of the Supreme Court of Wyoming upholding a condemnation for road purposes. In disposing of the contention that the statute and proceedings under it amounted to a denial of due process of law, the court said:

"All persons are charged with knowledge of the provisions of statutes and must take note of the procedure adopted by them; and when that procedure is not unreasonable or arbitrary there are no constitutional limitations relieving them from conforming to it. This is especially the case with respect to those statutes relating to the taxation or condemnation of land. Such statutes are universally in force and are general in their application, facts of which the land owner must take account in providing for the management of his property and safeguarding his interest in it. Owners of real estate may so order their affairs that they may be informed of tax or condemnation proceedings of which there is published notice, and the law may be framed in recognition of that fact. In consequence, it has been uniformly held that statutes providing for taxation or condemnation of land may adopt a procedure summary in character, and that notice of such proceedings may be in- [fol. 39] direct, provided only that the period of notice of the initiation of proceedings and the method of giving it are reasonably adapted to the nature of the proceedings and their subject matter and afford to the property owner reasonable opportunity at some stage of the proceedings to protect his property from an arbitrary or unjust appropriation. *Huling v. Kaw Valley Railway & Improvement Co.*, 130 U. S. 559; *Ballard v. Hunter*, 204 U. S. 241, at p. 262." (l. c. 283)

With respect to notice by publication, after stating the facts and the requirements of the statute, the court said further:

". . . These requirements in all material respects are identical with those passed upon by this Court in *Huling v.*

Kaw Valley Railway & Improvement Co., supra, in which it was held that a statute of Kansas providing that the condemnation of land for use for railroad purposes might be effected on thirty days' notice by publication in a newspaper, satisfied all the requirements of due process of law." (l. c. 285)

Appellees direct our attention to *Harrison v. Newman*, 71 Kan. 324, 80 Pac. 599. In that case the question was whether one statute requiring personal notice or another providing for notice by publication controlled. This court held the latter statute controlled and that notice thereunder was properly given. No question of constitutionality was involved and the case cannot be said to be decisive here.

No opinion of this court on the precise question of constitutionality of the statute in question has been cited in the briefs, nor does our limited search disclose any, but by the great weight of authority the answer must be that the statute under consideration did not deprive the appellant of due process of law and that the trial court did not err in holding that G. S. 1949, 26-202 was not unconstitutional for any reason asserted by the appellant, and accordingly

The judgment of the trial court is affirmed.

[fol. 40] Petition for Rehearing covering 6 pages filed omitted from this print. It was denied, and nothing more by order.

[fols. 41-42] In Supreme Court of Kansas

Order Allowing Substitutions and Denying Motion for Rehearing—July 6, 1955

39,782

Lee Walker, Appellant,

v.

City of Hutchison, Kansas et al.

Motion by appellant to substitute as appellees herein certain newly and appointed officials of the City of Hutchinson for certain present appellees herein no longer officials of

said City, Allowed; Motion by appellant for rehearing, Denied.

[fol. 43] IN THE SUPREME COURT OF THE STATE OF KANSAS

[Title omitted]

ORDER GRANTING MOTION TO SUBSTITUTE PARTIES-APPELLEE HEREIN—July 6, 1955

Now on this 6th day of July, 1955, this cause comes before the Court upon the Appellant's Motion to substitute certain newly elected and appointed officials of the City of Hutchinson, Kansas, for certain present appellees no longer officials of said City.

The Court, being fully advised in the premises, and after due consideration, Finds that said Motion should be sustained, and that certain parties be made parties-appellee herein in lieu of certain present parties-appellee.

It Is Therefore by This Court Ordered that John Olson, now the duly elected, qualified and acting Mayor of the City of Hutchinson, Reno County, Kansas, be and he is hereby made a party-appellee herein, in place of the present party-[fols. 44-45] appellee Robert G. King, no longer Mayor of the City of Hutchinson, Kansas.

It Is Further by This Court Ordered that Joe Bennett and E. J. Whalen, Jr., now duly elected, qualified and acting members of the City Commission of the City of Hutchinson, Reno County, Kansas, be and they are hereby made parties-appellee herein in place of Charles N. Brown and Jerry Stremel, no longer members of the City Commission of the City of Hutchinson, Kansas.

It Is Further by This Court Ordered that Hal Everett, now the duly appointed, qualified and acting City Manager of the City of Hutchinson, Reno County, Kansas, be and he is hereby made a party-appellee herein in place of T. E. Chenoweth, no longer the City Manager of Hutchinson, Kansas.

W. W. Harvey, Chief Justice for the Court.

[fol. 46] IN THE SUPREME COURT OF THE STATE OF KANSAS

[Title omitted]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

1. Notice is hereby given that Lee Walker, the appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Kansas, affirming the decision of the Court below which ruled constitutional a state law re notice in condemnation proceedings, dated and entered in this action on June 11th, 1955; Order denying rehearing dated and entered July 6th, 1955.

This appeal is taken pursuant to 28 U. S. C. Section 1257 (2).

[fol. 47] II. The Clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

a. Abstract of Appellant.

b. Syllabus and opinion of the Supreme Court of the State of Kansas filed June 11th, 1955, and Order.

c. Order denying Motion for Rehearing, dated July 6th, 1955.

d. Order dated July 6th, 1955, substituting parties.

e. This Notice of Appeal, including proof of service.

III. The following questions are presented by this appeal:

a. Whether G. S. 26-202 of the Statutes of Kansas (1949), which permits a city to give notice of the commencement of condemnation proceedings against real property by publication one time in the official city paper, is repugnant to the due process clause of the Fourteenth Amendment of the United States Constitution.

b. Whether the aforesaid statute, when construed and applied to permit condemnations of property without any other notice in a case in which the owner had no actual notice or any reason to know of the contemplated condemnation proceedings, and the aforesaid owner is eighty years

of age and has only an education equivalent to the sixth grade, is repugnant to the due process clause of the Fourteenth Amendment.

A. Lewis Oswald, Attorney of Lee Walker, Appellant, Law Offices of Oswald, Mitchell & Thiessen, 119 West Sherman Street, Hutchinson, Kansas.

[fol. 48] Acknowledgment of Service of Notice of Appeal to the Supreme Court of the United States (Omitted in Printing)

[fol. 49] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 50] Supreme Court of the United States

[Title omitted]

Order Noting Probable Jurisdiction—January 9, 1956

Appeal from the Supreme Court of the State of Kansas

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary calendar.

January 9, 1956.

Office Supreme Court, U.S.
FILED
NOV 4 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 507

LEE WALKER,

Appellant;

against

CITY OF HUTCHINSON, RENO COUNTY, KANSAS, a municipal corporation; T. E. CHENOWETH, City Manager of said City; ROBERT G. KING, Mayor and Member of the City Commission of said City; CHARLES N. BROWN, JERRY STREMEL, R. C. WOODARD and C. E. JOHNSON, Members of the City Commission of said City.

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Opinions Below

The opinion of the District Court of Reno County, Kansas, has not been reported. The decision of the Supreme Court of the State of Kansas is reported at 178 Kan. 263, 284 P. 2d 1073. Copies of those opinions are annexed hereto as appendices A and B respectively, at pp. 12 and 24 respectively.

Grounds on Which Jurisdiction Is Invoked

1. *The nature of the proceeding.* Appellant, a property owner, brought an action to permanently enjoin the de-

fendant City of Hutchinson, Kansas, from entering or trespassing upon plaintiff's real estate, which had previously been condemned by the City of Hutchinson under its powers of eminent domain. Only a single unseen notice of publication had been given. Appellant had neither actual notice nor opportunity for a hearing. This is an appeal from the decision of the Supreme Court of the State of Kansas affirming the dismissal of the petition.

2. *The judgment or decree sought to be reviewed* was dated and entered on June 11, 1955, and is embodied in the opinion of the Supreme Court of the State of Kansas (*post*, at p. 32). No separate order, judgment or decree was entered, the opinion itself containing the order. An order denying rehearing was dated and entered July 6, 1955. The notice of appeal to this Court was filed in the Supreme Court of the State of Kansas on September 6, 1955.

3. *The statutory provision believed to confer on this Court jurisdiction* of the appeal is 28 U. S. C. Sec. 1257(2).

4. *Cases believed to sustain the jurisdiction: Mullane* v. *Central Hanover Bank and Trust Co.*, 339 U. S. 306; *Georgia* v. *Chattanooga*, 264 U. S. 472; *North Larramie Land Co.* v. *Hoffman*, 268 U. S. 276.

5. *State statute whose validity is involved.*

G. S. 1949, 26-202. "The commissioners appointed by the judge of the district court shall give any owner and any lienholder of record of the property sought to be taken at least ten days' notice in writing of the time and place when and where the damage will be assessed, or by one publication in the official city paper, and at the time fixed by such notice shall, upon actual view, appraise the value of the lands taken and assess the other damages done to the owners of such property, respectively, by such appropriations."

Questions Presented

1. Whether G. S. 1949, 26-202 of the statutes of Kansas, which permits a city to give notice of the commencement of condemnation proceedings against real property by publication one time in the official city paper, is repugnant to the due process clause of the Fourteenth Amendment of the United States Constitution.

2. Whether the aforesaid statute, when construed and applied to permit condemnations of property without any other notice in a case in which the owner had no actual notice or any reason to know of the contemplated condemnation proceedings, and the aforesaid owner is eighty years of age and has only an education equivalent to the sixth grade, is repugnant to the due process clause of the Fourteenth Amendment.

Statement of the Case

Appellant filed an amended petition for a permanent injunction against the City of Hutchinson and its various officers in the District Court of Reno County, Kansas. The amended petition (A.A. 2-6)[1] alleged that the plaintiff, an 80-year old Negro with a sixth grade education, had owned certain real estate for 49 years. It was further alleged that the City of Hutchinson had filed an action for condemnation of said property in the same court against the same property, of which action plaintiff never received any notice through summons or otherwise. The action of the City, the complaint alleged, rested upon its purported power to institute such proceedings by one publication in the official City paper, which said publication had been had, but plaintiff had never learned of these proceedings

[1] Such references are to the page numbers of "Abstract of Appellant".

until several months after the court action had been concluded. The complaint further alleged that the "single notice so published in the official newspaper was insufficient notice to satisfy the requirements of the Due Process clauses of both Federal and State constitutions." (A.A. 4). The answer admitted that only one such publication had been timely made (A.A. 6). The answer claimed that the said notice by publication was sufficient under the due process clause of both the United States and Kansas constitutions (A.A. 7). It showed that the said notice of condemnation had been addressed to approximately 33 persons, and that plaintiff's name was 25th on the list.[2] Plaintiff's reply denied the legal conclusion that the statute did not violate the Fourteenth Amendment due process clause (A.A. 13).

The District Court, in its memorandum opinion, ruled solely on the question of constitutionality, holding that the statute did not violate the due process clause of the Fourteenth Amendment. Said the Court:

> "In view of what has been said above, and the authorities there cited, it must be held that the section under consideration is constitutional and that, since it is conceded that the City acted pursuant to such statute and complied with its requirements, plaintiff has not been deprived of his property without due process of law." (A.A. 23).

---

[2] The addressing part of the notice of condemnation read as follows: "To: PATRICK J. O'FARRELL, AGATHA O'FARRELL, JENNIE MUELLER, KENNETH D. GITCHELL, MYRTLE GITCHELL, J. O. GITCHELL, NELLIE B. GITCHELL, EVERETT S. COLE, NINA M. COLE, NELLIE GITCHELL, PEARL D. GRAHAM, THE RAILROAD BUILDING, LAND AND SAVINGS ASSOCIATION, H. K. GORDON, VIRGINIA DEAN GORDON, V. W. COCHRAN, ANITA COCHRAN, ROY FREEMAN, J. W. WOOD, OPAL O. WOOD, FRED W. GILBERT, FERN GILBERT, FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF HUTCHINSON, OBLATE AND COMPANY, LEE WALKER, GLADYS G. WHITFORD, CLAUDE M. REED, ANNA EDNA REED, M. M. HAYS, RUTH J. HAYS, HERBERT K. HARRISON, THERESA R. HARRISON, W. C. WILDE, AND ALL OTHER PERSONS CONCERNED." (A.A. 8).

The notice of appeal to the Supreme Court of Kansas specified as the sole ground for appeal that plaintiff had been deprived of his property without due process of law (A.A. 26-27). The Supreme Court of the State of Kansas affirmed the decision below, after discussing federal and state precedents, holding that the statute did not violate the due process clause of the Fourteenth Amendment of the U. S. Constitution. Said the Court:

> "No opinion of this court on the precise question of constitutionality of the statute in question has been cited in the briefs, nor does our limited search disclose any, but by the great weight of authority the answer must be that the statute under consideration did not deprive the appellant of due process of law and that *the trial court did not err in holding that G.S. 1949, 26-202 was not unconstitutional for any reason asserted by the appellant*, and accordingly the judgment of the trial court is affirmed." App. B at 32, *post*; 178 Kan. at 269, 284 P. 2d at 1077. (Emphasis supplied.)

Substantiality of Federal Questions

The questions raised in this case are perhaps among the most vital due-process questions affecting property rights since the steel seizure case. For if the procedure condoned below is not ruled unconstitutional, it means that any real property owner in the United States—be he illiterate or educated, a newspaper reader or non-newspaper reader, his address known or unknown—may be deprived of his property in eminent domain proceedings and compensation determined without notice and the right to be heard merely upon one publication in an official city newspaper, whether or not he has ever seen that newspaper or had an opportunity to do so. The substantiality of the questions raised herein is reinforced by the fact that eight persons have filed this Term a Petition for a Writ of Certiorari to the U. S. Court of Appeals for the Tenth Circuit in a case involving this very same issue. *Collins*

et al. v. *The City of Wichita, Kansas*, No. 392, U. S. Sup. Ct., Oct. Term, 1955.

We contend that the statute, both on its face and as construed and applied, is repugnant to the due process clause of the Fourteenth Amendment to the U. S. Constitution. This follows from this Court's opinion in *Mullane* v. *Central Hanover Bank and Trust Co.*, 339 U. S. 306, for this Court there held that the distinction between actions *in rem* and actions *in personam*—the basis on which the courts below proceeded—was an artificial distinction which did not solve the problem of what was adequate notice under the due process clause of the Fourteenth Amendment. Said this Court:

> "* * * But in any event we think that the requirements of the Fourteenth Amendment to the Federal Constitution do not depend upon a classification for which the standards are so elusive and confused generally and which, being primarily for state courts to define, may and do vary from state to state. Without disparaging the usefulness of distinctions between actions in rem and those in personam in many branches of law, or on other issues, or the reasoning which underlies them, we do not rest the power of the State to resort to constructive service in this proceeding upon how its courts or this Court may regard this historic antithesis. It is sufficient to observe that, whatever the technical definition of its chosen procedure, the interest of each state in providing means to close trusts that exist by the grace of its laws and are administered under the supervision of its courts is so insistent and rooted in custom as to establish beyond doubt the right of its courts to determine the interests of all claimants, resident or nonresident, provided its procedure accords full opportunity to appear and be heard." 339 U. S. at 312-313.

The question in every case is whether the notice given was "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

* * *" This must be done "with due regard for the practicalities and peculiarities of the case * * *." *Id.* at 314-15. This opinion was ignored by the courts below.

We submit that the notice in the case at bar was given without any regard for the practicalities or peculiarities of either the individual case or the kind of cases which arise. There is no excuse in reason or logic to deprive a citizen resident of a state of some form of actual notice; we have so far been unable to discover any other statute of another state permitting only notice by one publication. While it may be argued that each citizen is charged with the knowledge of the law, and that therefore each and every property owner is charged with a duty of reading the official city newspaper each and every day 365 days a year to see if any proceedings have been begun, it must be pointed out that in the *Mullane* case the notice given to the individuals effected by publication in a local newspaper was given only after the individuals concerned had been given actual notice of the statute, and that this Court nonetheless ruled that such publication was not due notice. The publication there was a publication for at least four times. Publication here was given only once. The residence of plaintiff in this case was always known to the defendants; he had always paid his assessments and taxes (A.A. 3). Respondents have nowhere contended that notice given by mail would have been impracticable. Said this Court in *Mullane:*

> "As to known present beneficiaries of known places of residence, however, notice by publication stands on a different footing. Exceptions in the name of necessity do not sweep away the rule that within the limits of practicability notice must be such as is reasonably calculated to reach interested parties. Where the names and post-office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency." *Id.* at 318.

* * * * * *

"The statutory notice to known beneficiaries is inadequate not because in fact it fails to reach everyone, but because under the circumstances it is not reasonably calculated to reach those who could easily be informed by other means at hand. However it may have been in former times, the mails today are recognized as an efficient and inexpensive means of communication. Moreover, the fact that the trust company has been able to give mailed notice to known beneficiaries at the time the common trust fund was established is persuasive that postal notification at the time of accounting would not seriously burden the plan.

"In some situations the law requires greater precautions in its proceedings than the business world accepts for its own purposes. In few, if any, will it be satisfied with less. Certainly it is instructive, in determining the reasonableness of the impersonal broadcast notification here used, to ask whether it would satisfy a prudent man of business, counting his pennies but finding it in his interest to convey information to many persons whose names and addresses are in his files. We are not satisfied that it would. Publication may theoretically be available for all the world to see, but it is too much in our day to suppose that each or any individual beneficiary does or could examine all that is published to see if something may be tucked away in it that affects his property interests. We have before indicated in reference to notice by publication that, 'Great caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact.' McDonald v. Mabee, 243 U. S. 90, 91, 61 L. ed. 609, 37 S. Ct. 343, LRA 1917 F 458." *Id.* at 319-20.

Any other rule would surely be violative of due process. For one thing, it is too much to expect that every person who owns property for 50 years will examine the legal notices in the official city paper 18,250 times, poring through all the names that are mentioned. Old men with little schooling, like plaintiff, cannot be expected to receive actual notice through this device. The forlorn hope that some-

friend of the person affected might be such an avid reader of legal notices that he would note this and tell the property owner about it is even more forlorn when only one publication is made. There is no assurance even that a property owner will be able to receive each daily newspaper; the issue of the day might be sold out, and it is too much to expect the property owner to journey to a library to examine each issue, if indeed the library happens to contain the paper.

The opportunities for abuse by the procedures sanctioned below are great. In the *Collins* case, *supra,* for example, a proceeding was begun in which the landowners appeared, but a new notice of condemnation was printed in the daily paper, which did not come to anyone's attention, and the property stood condemned nonetheless through this second proceeding (Petition, pp. 6-8).

The Court below cited only two U. S. Supreme Court cases. Both are inapposite. It cited *Georgia* v. *Chattanooga,* 264 U. S. 472, for the proposition that "the taking was a legislative and not a judicial function and an opportunity to be heard in advance need not be given * * * " (178 Kan. at 268, 284 P. 2d at 1076), but ignored this Court's subsequent language in a later case that "With respect to the compensation for the taking, however, due process requires that the owner be given opportunity to be heard, upon reasonable notice of the pending proceedings." *North Larramie Land Co.* v. *Hoffman,* 268 U. S. 276, 284-285. The *Georgia* case also involved a nonresident who could not be personally served. And in citing the *North Larramie* case in support of its position, the court below ignored the fact that the statute there in question required *nine* publications, and that the landowner had a right to go into court after appraisal with a right to trial *de novo.* In any event, to the extent that these two cases

are inconsistent with *Mullane*, they either have been or should be overruled.[3]

The only excuse for procedure of notice by publication, as this Court held in *Mullane*, is that the person cannot be personally reached because his address is not known. This has been the traditional justification behind the whole doctrine of service by publication; it is surely lacking here. The statute applies both to persons whose addresses are known and those unknown. The state has failed to provide any other remedy through which a person who does not receive actual notice could reopen the case. These circumstances so shock the conscience as to amount to a severe violation of due process of law.

We do not believe that this Court can sanction the procedure under which a person who had enjoyed quiet possession of property for 49 years could be deprived overnight of his property without any actual notice, when his address was on the records of the city, through one publication in a newspaper of his name lumped with many others. If this procedure be countenanced, then divorce actions could be started solely by one publication in a newspaper; legal actions could be begun in the same fashion; and our busy citizenry would be reduced to the status of poring through small type legal notices in our newspapers without any assurance at all that they will receive notice of actions that may be begun against them or their belongings.

We annex herewith, as Appendix C, an affidavit of A. Lewis Oswald which indicates that large numbers of persons' rights would be affected by a decision in this case.

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[3] Perhaps the true rule is this: that whatever may be the rule as to notice re a sovereign's plenary power over land, and whatever may be the rule in the clearly *in rem* proceeding to transfer title, the question of the *amount* of the award—clearly involving only a sum of money—cannot be determined by proceedings without the same notice that would be constitutionally required in an ordinary action at law. The statute in question here deals solely with appraisal.

We believe that the discussion above, together with this affidavit, demonstrate that the questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution. Consider, too, that the decisions of the highest state courts are in conflict on substantial aspects of the questions presented (see District Court opinion, p. 18, *post*).

Respectfully submitted,

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APPENDIX A

Memorandum Opinion of the District Court of Reno County, Kansas

Plaintiff's application for a temporary injunction was heard on October 4th. At the conclusion of the hearing, counsel requested that, to eliminate the need of further trial, the case be placed at issue immediately and that decision then be rendered on plaintiff's prayer for a permanent injunction, based on the pleadings, and considering the proceedings of October 4th as having been had on a hearing for permanent injunction. By agreement of counsel, defendants' motion to strike was thereupon sustained, after which plaintiff filed his amended petition. The defendants have filed their answer, and the plaintiff, his reply. The case is now at issue and decision will be as to the issuance of a permanent injunction.

At the outset it must be borne in mind that the inquiry in this matter must be directed to the constitutionality of Section 26-202 as it pertains to the facts of this case and whether plaintiff has been deprived of his property without due process of law by reason of the notice given thereunder, rather than to the wisdom of the legislature in passing the statute or the expediency of action by the City pursuant thereto. Whether the statute was wisely enacted and whether sound public policy should dictate the giving of different or additional notice are matters that must be addressed to the legislative rather than to the judicial branch of government, always provided of course that the statute does not contravene constitutional provisions.

The statute involved in this action provides, so far as herein pertinent, that the condemnation commissioners shall give owners and lien holders of the property condemned

at least 10 days notice in writing of the time and place when and where the damage will be assessed, *or* by one publication in the official city paper. This statute first appeared as Section 2, of Chapter 86, Laws of 1913, in which it was provided that the commissioners give at least 10 days' notice in writing by one publication in the official city paper. The 1913 law was revised in 1923 and appeared in its present form in the Revised Statutes of 1923. It has undergone no material change since then.

It is plaintiff's contention that the notice provided for by said statute is unconstitutional, particularly as it pertains to resident land owners, because it provides for notice by publication rather than by personal service. However, the general rule appears to be that personal service of a notice of this knid is not required by those constitutional provisions that prohibit the taking of property without due process of law. In Section 1534, McQuillan on Municipal Corporations, the rule is thus stated:

> "It is almost universally held, however, that notice by publication or posting is sufficient, even with respect to persons residing within the jurisdiction where the proceedings are pending."

The same rule is set out in 20 CJ 938, wherein it is said:

> "Personal notice to the owner is not a constitutional prerequisite to the validity of condemnation proceedings, and it is competent for the legislature to provide for constructive notice by publication."

In the case of State of Georgia v. City of Chattanooga, 264 U. S. 472; 44 Sup. Ct. 369; 68 Law Ed. 796, the United States Supreme Court, speaking on page 800, says:

> "Personal service upon the owner is not essential; publication of notice is sufficient."

This rule was approved and followed in the cases of Newman, et al. v. Lynchburg Investment Corporation, 236

U. S. 692; 35 Sup. Ct. 477, 59 Law Ed. 792, and Ballard v. Hunter, 204 U. S. 254; 51 Law Ed. 461. And in the case of North Laramie Land Company v. Hoffman, 268 U. S. 283; 69 Law Ed. 953, the court says:

> "All persons are charged with knowledge of the provisions of statutes, and must take note of the procedure adopted by them, and when that procedure is not unreasonable or arbitrary, there are no constitutional limitations relieving them from conforming to it. This is especially the case with respect to those statutes relating to the taxation or condemnation of land. Such statutes are universally in force and are general in their application,—facts of which the landowner must take account in providing for the management of his property and safeguarding his interest in it. Owners of real estate may so order their affairs that they may be informed of tax or condemnation proceedings of which there is published notice, and the law may be framed in recognition of that fact. In consequence, it has been uniformly held that statutes providing for taxation or condemnation of land may adopt a procedure, summary in character, and that notice of such proceedings may be indirect, provided only that the period of notice of the initiation of proceedings and the method of giving it are reasonably adapted to the nature of the proceedings and their subject matter, and afford to the property owner reasonable opportunity, at some stage of the proceedings, to protect his property from an arbitrary or unjust appropriation."

One of the latest expressions of the United States Supreme Court is found in the case of Anderson National Bank v. Luckett, 321 U. S. 233; 64 Law Ed. 599, in which the court upheld notice given to bank depositors by posting a report on the courthouse door or bulletin board as being sufficient to satisfy the requirements of due process of law. In discussing the question, the court says, on page 605:

"All persons having property located within the state and subject to its dominion must take note of its statutes affecting the control or disposition of such property and other procedure which they set up for those purposes (citing authorities). Proceedings for the assessment of taxes, the condemnation of land, the establishment of highways and public improvements affecting landowners are familiar examples."

Cases from several states are found in support of this rule of law, and reference is here made to a few of them. In the case of Henritzy v. Harrison County (Miss.), 178 So. 322, the county had condemned land without any notice and thereafter published notice advising land owners to file their claims for compensation within 30 days. This procedure was held valid, and the court, in its discussion, said:

"In the case of Stewart v. Hinds County, 25 Miss. 479, the point was made by the owner of the land that he could not be bound by the condemnation proceedings without being first personally served with notice, he being a resident of the state. But the court held that notice in such case may be either actual or constructive, and particularly so in a case like this (condemnation for highways) which is a proceeding in rem and not in personam."

"We believe the present case is strictly a proceeding in rem, in which the order of the court is conclusive, whether the party had notice of the proceeding or not."

The case of Nishnabotna v. Drainage District (Mo.), 55 SW 276, was one in which the court upheld a statute that authorized the institution of condemnation proceedings by the publication of notice against owners regardless of their residence. On page 277, the court says:

"That the legislature had the right to prescribe the manner of giving notice in such cases there can be no question, provided always that it be reasonable."

The statute involved in the case required a 15 days' notice and notice was actually given for 19 days, in three publications. In the case of Ryan v. Housing Authority of the City of Newark, 15 Atl. 2647, the Supreme Court of the State of New Jersey held that notice of the proceedings may be indirect. See also, Great Northern R. Co. v. Minneapolis, 136 Minn. 1, 161 N. W. 231; Taylor v. Emmet Co. Drainage Dist., 167 Iowa 42, 148 N. W. 1040; Wulzen v. San Francisco, 101 Cal. 15, 35 Pac. 353.

The case of Winnebago Furniture Manufacturing Company v. Wisconsin Railway Company, 51 N. W. 576, appears to be quite in point. In that case the Wisconsin statute provided for alternative methods of giving notice, either by publication or by personal service, and the court, in upholding the statute, says:

> "The statute provides that notice 'may be served personally or at the last and usual abode of such owners and parties interested not less than five days before such hearing, or by publication in some newspaper, to be designated by said court or judge, not less than ten days before the date set for hearing such petition.' The statute undoubtedly gives the petitioner the right to give notice in either of the methods specified and by publication on resident as well as non-resident owners in case the court or a judge thereof shall so provide in the order. There is no constitutional requirement that we are aware of which prevents notice from being given by publication. Mr. Lewis, in his work on Eminent Domain, Section 367, says, 'In regard to the kind of notice which will satisfy the requirements of the constitution in proceedings to take land for public use, the authorities almost universally hold that notice by publication or posting is sufficient, even with respect to persons residing within the jurisdiction where the proceedings are pending'."

It is to be noted that the statute involved in this case is very similar to the one under consideration since the alternative methods of giving notice are the same and the length of time required is identical.

Admittedly, there are authorities which hold to the contrary. The Supreme Court of Michigan in the case of Knudinger v. City of Saginaw, 26 N. W. 364, declared invalid a city ordinance which made no provision for personal service of a notice upon resident owners in cases where such service was feasible. Likewise, the Supreme Court of the State of Washington, in the case of Smith, et al. v. Cochrane, (Wash.), 37 P. 311, held that personal notice was necessary in case of resident landowners and that the requirements of due process were not fulfilled when publication service only was had upon them. However, in this latter case the court recognizes that its holding is against the weight of authority and says, on page 312:

> "Returning to the question of notice, there is no doubt that the prevailing number of cases, and perhaps the weight of authority, the country over, is that in condemnation cases the legislature has the power to prescribe the kind of notice, whether personal or constructive, which shall be given to property owners, resident or nonresident. Lewis, Em. Dom. Sec. 367; Brown, Jr., Sec. 172; Elliott, Roads & S., pp. 152, 153."

Two Wisconsin cases are also cited in support of the doctrine enunciated in the last two cases but both cases were decided prior to the case of Winnebago Furniture Company v. Wisconsin Railway Company, supra, and both were overruled by the later case.

Although the Supreme Court of Kansas has never passed upon the constitutionality of Section 26-202, or the validity of the provision for notice, nevertheless it has had occasion to discuss and pass upon similar questions relating to notice

in connection with other condemnation statutes. The early case of Hunt v. Smith, 9 Kan. 137, was an action to enjoin certain individuals from appropriating land for a railroad right of way and to recover damages for trespass upon such land. The defense interposed was that the land had been condemned, but plaintiff contended that the condemnation proceedings were invalid because of defective notice. Section 49 of the pertinent law then in effect required that personal notice be served upon actual occupants of the land, while Section 86 provided for notice by newspaper publication generally. The plaintiff alleged he was a resident of the state, was in actual possession of the land, looking after and caring for the same, but did not actually reside thereon, although having keys to the house and stables. The court held that plaintiff was not an actual occupant of the land, although he was the owner, and that the service upon him by publication was valid. The court says on page 145:

> "An owner of land is not in the actual occupancy of the same within the meaning of Section 49 of the act concerning private corporations, unless he is an actual resident thereon: and where such owner is not an actual occupant of the land, notice of the appropriation of a part of the same for a right of way for a railroad given by publication in a newspaper as provided by Amended Section 86 of such act, is sufficient."

The case of Missouri River F. S. & G. R. Company v. Shepard, 9 Kan. 647, was brought against the railroad company to recover damages for trespass and involves the same Section 86 referred to in the Hunt case. The railroad company had condemned certain land but the plaintiff, who was the owner and in possession of the land concerned, claimed that the proceedings were invalid for the reason that no map and profile had been filed before notice was given and that therefore there was no

actual notice. The court first discussed the question of filing the map and profile and concluded that it need not be done before publishing notice. Then, turning to the question of notice, the court says on page 654:

> "Is the law unconstitutional because providing for no notice? If the law was silent as to notice, and an attempt was made by it to divest one of his property without any pretense of notice, its unconstitutionality would be undisputed. A man cannot be deprived of his property without due process of law. This process of law implies notice; not necessarily actual, personal notice, but notice; such that there is a reasonable probability of the party's receiving it." . . . "Article 9 is not obnoxious to the charge of attempting to divest property without notice. It attempts to provide for notice. It requires notice, gives opportunity to be heard and defend, and right of appeal from the decision of the commissioners to the district court. The real objection, therefore, is that the notice provided for is insufficient. Section 86 of this article reads, that 'before any board of county commissioners shall proceed to lay off any railroad route as herein provided, notice of the time when the same shall be commenced shall be given by publication, thirty days before the time fixed, in some newspaper published in such county', etc. This does not contemplate personal notice. Nor is this essential. As we understand the learned counsel for defendant in error, they concede this. The statutes are full of instances of constructive notice, as in cases of publication against non-residents, in attachment suits, foreclosures of mortgages, etc.; or in cases of changes in the valuation of real estate by the boards of equalization; or in the matter of street improvements in cities, or opening roads in the country."

This language is peculiarly appropriate to the case at bar and has never been criticized by the Supreme Court in any subsequent decision. It appears just as valid today as it was when uttered many years ago.

The provisions concerning notice by publication contained in this same Section 86 were upheld by the Supreme Court of the United States in the case of Huling v. Kaw Valley Railway and Improvement Company, 130 U. S. 559, 32 Law Ed. 1045. Although in this case the land owner was a non-resident of the state, and the precisee question involved was the validity of the service as it pertained to such an owner, no distinction seems to have been made, in much of the language used, between residents and non-residents. On page 563, the court, in discussing the propriety of publication notice, states:

> "Nor have we any doubt that this form of warning owners of property to appear and defend their interest, where it is subject to demands for public use when authorized by statute, is sufficient to subject the property to the action by the tribunals appointed by proper authority to determine those matters."

A more recent Kansas case, which is illuminating, is that of Harrison v. Newman, et al., 71 Kan. 324, which upheld a notice by publication given in condemnation proceedings. The statute provided for the appointment of appraisers who should have at least three days' notice in the official paper of the time and place of their meeting for the assessment of damages and benefits. The court held that condemnation proceedings conducted under this statute and in pursuance of such notice was valid. In the syllabus the law of the case is set out as follows:

> "The notice required by section 160 of the act relating to cities of the first class (Laws 1903, ch. 122) to be given by the appraisers appointed to assess damages and benefits incident to the opening of an alley is a

substitute for the notice required by section 161a of the same act to be given by the appraisers appointed to assess damages in condemnation proceedings generally."

"A requirement that at least three days' notice in the official city paper shall be given of the meeting of the appraisers in condemnation proceedings is satisfied by the publication of a notice in one issue of such paper nine days before the time set."

In view of the Kansas cases cited above, none of which have been disapproved or overruled in any way, it appears to me that the question as to the validity of notice by publication cannot at this time be considered an open one in Kansas. The pronouncements of the Supreme Court concerning the notice required in condemnation matters appears definitely to be in accord with the generally accepted rule prevailing in this country.

But it is also contended the statute is invalid for the further reason that the length of notice required is but 10 days and that but one publication thereof is required. Parenthetically it may here be noted that the notice was actually published 13 days prior to the meeting of the condemnation commissioners. Perusal of cases involving the question of notice discloses a variety of statutory provisions as to requirements for length of time and number of publications, ranging from the three days and one publication involved in Harrison v. Newman, supra, to the thirty days' notice required by the statute construed in Hunt v. Smith, supra, and Missouri River F. S. & G. R. Company v. Shepard, supra. In the Wisconsin case before cited the length of time was 10 days and the number of publications one. Statutes construed in other cases cited herein provide for notices of 10, 15, 20 and 30 days, with the number of publications varying in each instance with the length of the notice. From a consideration of all the cases examined I cannot conclude that the provi-

sions for notice contained in Section 26-202 are so unreasonable as to violate the due process clause of the constitution.

In view of what has been said above, and the authorities there cited, it must be held that the section under consideration is constitutional and that, since it is conceded that the City acted pursuant to such statute and complied with its requirements, plaintiff has not been deprived of his property without due process of law.

In arriving at this conclusion the Court does not intend to express an opinion as to the wisdom of the statutory requirement, nor to indicate any personal approval of the form or type of notice given in these condemnation proceedings. Such matters are not within the judicial prerogative.

In accordance with the views expressed herein the plaintiff's prayer for a permanent injunction will be denied as of the 1st day of November, 1954.

JOHN FONTRON,
District Judge.

APPENDIX B

Opinion of the Supreme Court of the State of Kansas

No. 39,782

SYLLABUS BY THE COURT

In an action to enjoin a city from entering upon real estate taken by it under a proceeding in eminent domain, the record is examined, and it is *held,* that G. S. 1949, 26-202, which provides that the commissioners appointed by the judge of the district court shall give any owner of the property sought to be taken ten days' notice by publication in the official city paper that at the time fixed by such notice the commissioners will appraise the value of the lands taken and assess the other damages done to the owners of such property, does not deprive such owner of due process of law and is not unconstitutional.

Appeal from Reno district court; JOHN FONTRON, judge. Opinion filed June 11, 1955. Affirmed.

The opinion of the court was delivered by

THIELE, J.: This was an action in which the plaintiff Lee Walker sought an injunction against the defendant city to prevent an alleged trespass on his real estate. The relief sought was denied by the trial court and plaintiff has appealed.

Insofar as need be noticed plaintiff alleged that he owned certain described real estate in the city of Hutchinson and that on April 12, 1954, the city, by its officials, commenced proceedings in the district court to condemn property for the acquisition of right-of-way for opening, widening and extending portions of named streets in the city; that plaintiff had never been notified in any manner that the city desired his real estate nor had he ever been served with

summons nor given any personal notice that the city had filed the proceeding for the purpose of taking a part of his real estate; that the pretended right of the city to take the real estate owned by the plaintiff rested upon the authority of G. S. 1949, 26-201 and 26-202, which statutes are void and of no force because they attempt to vest the power in the city to take property without due process of law; that the only notice to an owner of real estate, under those statutes, is by publication and is not sufficient under the due process clauses of the United States constitution and the state constitution; that plaintiff had no actual notice or any reason to know the city sought to condemn and take his real estate until the middle of August, 1954, unless it can be said the single legal publication, published once in a named newspaper gave him notice, and that such single published notice was not sufficient to satisfy the requirements of the due process clauses of the above constitutions. It was further alleged that the city was entering upon plaintiff's real estate for the purpose of building a highway across it, all in disregard of plaintiff's rights and that he was entitled to an order enjoining the city from so doing, and he prayed accordingly.

The gist of the defendant's answer was that the city was proceeding under the above statutes, and that it instituted proceedings in eminent domain and that the commissioners appointed by the judge of the district court gave notice by publication in the manner prescribed by G. S. 1949, 26-202 which notice specifically named the plaintiff, described the portion of his real estate being condemned for a public street and which notice was published more than ten days prior to April 27, 1954, the date set forth in the notice for the meeting of the commissioners for assessment of damages and appraisal of the lands taken; that the notice by publication and the procedure followed was authorized by the above statutes and was legal and valid. Attached to the answer was a copy of the notice published in the Hutchinson News-Herald, the official city

paper, on April 14, 1954, which shows that notice of condemnation was given to Lee Walker and others that an application had been made requesting the district judge of Reno county to appoint commissioners to make an appraisement of lands taken under and by virtue of G. S. 1949, Ch. 26, Art. 2, and describing fourteen tracts of land in the city and that the judge had appointed three commissioners who would meet at a specified place on April 27, 1954, then and there to commence and proceed with the duties imposed upon them by law.

The plaintiff's reply admitted the material facts pleaded and denied the legal conclusion that the mentioned statutes did not violate constitutional provisions as to due process.

Details of the trial need not be noted. The trial court prepared a memorandum decision which covered rather fully the questions of constitutionality. The journal entry of judgment discloses the trial court heard the evidence, examined the pleadings and briefs filed and on November 1, 1954, found that G. S. 1949, 26-202 was constitutional; that the city of Hutchinson acted pursuant to it; that plaintiff had not been deprived of his property without due process of law and it denied plaintiff the relief for which he prayed and rendered judgment for the defendants.

The plaintiff perfected his appeal specifying as error that the trial court erred in holding G. S. 1949, 26-202 constitutional and in denying the injunction sought.

The question of constitutionality turns on the first sentence of the last mentioned statute, which reads:

> "The commissioners appointed by the judge of the district court shall give any owner and any lienholder of record of the property sought to be taken at least ten days' notice in writing of the time and place when and where the damage will be assessed, or by one publication in the official city paper, and at the time fixed by such notice shall, upon actual view, appraise the

value of the lands taken and assess the other damages done to the owners of such property, respectively, by such appropriations."

For purposes of information we note the above statute was amended by the legislature in 1955 by the enactment of Senate Bill No. 313.

In his brief the appellant first directs attention to and quotes from 12 Am. Jur. 267, where it is stated that the elements of due process of law are notice, and an opportunity to be heard and to defend; that it is a rule as old as the law that no one shall be personally bound until he has been duly cited to appear and has been afforded an opportunity to be heard, and that a judgment without such citation and opportunity lacks all the attributes of a judicial determination and is never to be upheld. Appellant then directs attention to the statute as quoted above and to the fact that it provides two methods for giving notice, one by a least ten days' notice in writing, the other by one publication in the official city paper, and he contends that the first method is fair and the second method unfair. It is here pointed out that he does not contend that if the second method was proper, what was done by the city did not fully meet the statutory requirement. In expanding his argument appellant stresses his age; his education and the length of time he had owned his real estate; that the three branches of the government, executive, legislative and judicial, have a duty to uphold the constitution and that it may not be amiss to consider how such an unconstitutional act was ever made part of the statutes; that in fairness the city should have given him personal notice and should not have followed the provision for publication notice; that the statute provided a right way and a wrong way and the "wrong way" violated his constitutional rights to due process. There is no specific argument that a statute providing for notice by publication in a proceeding to condemn lands in the exercise of the right of eminent domain is un-

constitutional as depriving the owner of due process of law, and except for the reference to 12 Am. Jur. 267, there is no citation of any authority in support of the argument made. In such a case we might follow the rule that where, in connection with a contention of error by the trial court, no citation is made of authorities in support, this court may well conclude that counsel, after diligent search, has not been able to find any, and affirm the judgment: (*McCoy v. Fleming,* 153 Kan. 780, 113 W. 2d 1074.)

In our opinion, however, the trial court did not err. In view of the question presented we need pay no attention to the provision for personal service, for none was had. The question is whether a statute which provides for publication service of notice, as was had, deprives the owner of real estate of his property without due process of law.

Our approach to the problem of constitutionality, or lack of it, is governed by the oft recognized rule that all presumptions are that the statute is constitutionally valid and before the court can declare it invalid it must clearly appear to be unconstitutional. (See *Hartman* v. *State Commission of Revenue and Taxation,* 164 Kan. 67, 70, 187 P. 2d 939; *Miller* v. *Jackson,* 166 Kan. 141, 143, 199 P. 2d 513; *Board of Education of School Dist. No. 1* v. *Robb,* 168 Kan. 368, 369, 212 P. 2d 306, and cases cited therein.) We also bear in mind that the general rule is that proceedings to exercise the right of eminent domain are in rem and not in personam (29 C. J. S. 1129, 18 Am. Jur. 738, McQuillin on Municipal Corporations, Vol. II, pg. 531, and *Todd* v. *Atchison, T. & S. F. Rly. Co.,* 134 Kan. 459, 7 P. 2d 79, and cases cited).

Although stated in varying language, in many of the texts and encyclopedias treating of notice in condemnation proceedings the rule almost universally followed is that where the statute does not preclude its application, notice by publication is sufficient and satisfies the constitutional requirement, even with respect to persons residing within

the jurisdiction where the proceedings are pending. See Lewis on Eminent Domain, Third Edition, pg. 1010, § 568; Randolph on Eminent Domain, pg. 306, § 337; Nichols on Eminent Domain, Vol. 4, pg. 339; McQuillin on Municipal Corporations, Vol. 11, pg. 549; 18 Am. Jur. pg. 967; and 29 C. J. S. pg. 1217.

In Merrill on Notice, Vol. 1, pg. 510, § 518 (published in 1952) it is said:

> "Assuming notification to be necessary, there is much liberality in the decisions as to the methods which, consistently with due process, may be employed. Save in isolated instances which hardly serve to mark exceptions to the general rule, personal notification is not regarded as an essential element of the 'law of the land,' unless a personal liability is to be enforced against one not otherwise subject to the 'jurisdiction'. The hallowing effect of time seems the chief factor in judicial willingness to accede to the employment of methods which can be regarded as likely actually to result in knowledge only upon the assumption that the notices, exercising the highest degree of care to determine whether any monition has been given, will carry his search into the highways and byways. Another factor, no doubt, is the expedition of public business resultant upon sustaining such arrangements.
>
> "Thus it comes about that public posting, eminently inefficient as a source of information under modern conditions, is accepted as consistent with due process of law in drainage, paving, and irrigation proceedings. Publication, a whit more dependable, but still a very precarious way of spreading the news, has received judicial approval in numerous instances, including: special assessment proceedings; proceedings to organize irrigation or drainage districts; the assessment, equalization, and enforcement of taxes; eminent domain proceedings; land registration proceedings; and

the process of administrative tribunals. The place of printing the newspaper in which a notice affecting realty is published has been held immaterial, the important thing being publication within the locality wherein the land affected lies. Publication within the limits of the principal city in a water district has been adjudged due process as to owners of land outside the city limits but within the boundaries of the district.

"Naturally combinations such as posting and publishing, or mailing and publishing, or a choice between either of two constitutionally permissible notifications, as posting or publishing, will pass muster."

In *Winnebago Furniture Mfg. Co.* v. *The Wisconsin Midland R. Co.*, 81 Wis. 389, 51 N. W. 576, the court considered the sufficiency of a notice arising under a statute similar to ours and held, in part, that:

". . . The statute provides that notice 'may be served personally or at the last and usual abode of such owners and parties interested, not less than five days before such hearing, or by publication in some newspaper to be designated by said court or judge, not less than ten days before the date fixed for the hearing of such petition.' The statute undoubtedly gives the petitioner the right to give notice in either of the methods specified, and by publication on resident as well as nonresident owners, in case the court or a judge thereof shall so provide in the order. There is no constitutional requirement that we are aware of which prevents notice from being given by publication. . . ." (l. c. 394)

Georgia v. *Chattanooga*, 264 U. S. 472, 44 S. Ct. 369, 68 L. Ed. 796, involved condemnation of lands for railroad purposes. The facts need not be detailed. In the course of the opinion it was said the taking was a legislative and

not a judicial function and an opportunity to be heard in advance need not be given, and further, that personal service on the owner was not essential: that publication of notice was sufficient.

In *North Laramie Land Co.* v. *Hoffman*, 268 U. S. 276; 45 S. Ct. 491, 69 L. Ed. 953, the court considered an appeal from the judgment of the Supreme Court of Wyoming upholding a condemnation for road purposes. In disposing of the contention that the statute and proceedings under it amounted to a denial of due process of law, the court said:

> "All persons are charged with knowledge of the provisions of statutes and must take note of the procedure adopted by them; and when that procedure is not unreasonable or arbitrary there are no constitutional limitations relieving them from conforming to it. This is especially the case with respect to those statutes relating to the taxation or condemnation of land. Such statutes are universally in force and are general in their application, facts of which the land owner must take account in providing for the management of his property and safeguarding his interest in it. Owners of real estate may so order their affairs that they may be informed of tax or condemnation proceedings of which there is published notice, and the law may be framed in recognition of that fact. In consequence, it has been uniformly held that statutes providing for taxation or condemnation of land may adopt a procedure summary in character, and that notice of such proceedings may be indirect, provided only that the period of notice of the initiation of proceedings and the method of giving it are reasonably adapted to the nature of the proceedings and their subject matter and afford to the property owner reasonable opportunity at some stage of the proceedings to protect his property from an arbitrary or unjust appropriation. *Huling* v. *Kaw Valley Railway & Improvement Co.*, 130 U. S. 559; *Ballard* v. *Hunter*, 204 U. S. 241, at p. 262." (l. c. 283)

With respect to notice by publication, after stating the facts and the requirements of the statute, the court said further:

> "* * * These requirements in all material respects are identical with those passed upon by this Court in *Huling* v. *Kaw Valley Railway & Improvement Co.*, *supra*, in which it was held that a statute of Kansas providing that the condemnation of land for use for railroad purposes might be effected on thirty days' notice by publication in a newspaper, satisfied all the requirements of due process of law." (l. c. 285)

Appellees direct our attention to *Harrison* v. *Newman*, 71 Kan. 324, 80 Pac. 599. In that case the question was whether one statute requiring personal notice or another providing for notice by publication controlled. This court held the latter statute controlled and that notice thereunder was properly given. No question of constitutionality was involved and the case cannot be said to be decisive here.

No opinion of this court on the precise question of constitutionality of the statute in question has been cited in the briefs, nor does our limited search disclose any, but by the great weight of authority the answer must be that the statute under consideration did not deprive the appellant of due process of law and that the trial court did not err in holding that G. S. 1949, 26-202 was not unconstitutional for any reason asserted by the appellant, and accordingly

The judgment of the trial court is affirmed.

APPENDIX C

IN THE

SUPREME COURT OF THE UNITED STATES.

LEE WALKER Appellant vs. CITY OF HUTCHINSON, RENO COUNTY, KANSAS, a Municipal Corporation; HAL EVERETT, City Manager of said City; JOHN OLSON, Mayor and Member of the City Commission of said City; JOE BENNETT, E. J. WHALEN, JR., R. C. WOODARD and C. E. JOHNSON, Members of the City Commission of said City Appellees	No. .....

AFFIDAVIT [1]

Relative to the use of G.S. 26-202, Kansas, for purpose of service on defendants.

STATE OF KANSAS }
COUNTY OF RENO } ss.:

A. Lewis Oswald, of lawful age, being first duly sworn on his oath, says:

1. That he is a member of the Bar of the Supreme Court of the United States; that he is a resident of Reno County, Kansas; and that his post office address is c/o Oswald, Mitchell & Thiessen, Attorneys, 119 West Sherman Street, Hutchinson, Kansas.

[1] The original copy of this affidavit has been filed with the Clerk of this Court.

2. That he is counsel for the Appellant in the above captioned cause of action.[5]

3. That he has personally examined the court files in the following causes of action, which were filed in the District Court of Reno County, Kansas, on the dates below set forth; that in each case so set forth, the only service upon the defendants therein was pursuant to the General Statutes of Kansas (1949), Section 26-202, namely by a single publication in a newspaper which had been duly designated as the official publication for said City of Hutchinson, Kansas:

Case No.	*Date Filed*	*Title of Cause of Action*
6235	Sept. 11, 1951	In the Matter of the Application of the City of Hutchinson, Kansas, a Municipal Corporation, for the Appointment of Commissioners in the Matter of the Condemnation of Private Property for an Off-Street Parking Station in the City of Hutchinson, Kansas.

(This file shows, by affidavit of D. R. Brown, business manager of The Hutchinson News-Herald, to which affidavit a copy of said publication of "Notice of Condemnation" is attached, that said publication was published only ONE time, namely on the 21st day of September, 1951.

Said "Notice of Condemnation" gives notice to Robert E. Mann, Arthur R. Mann, L. M. Mayfield, Charles Hatfield and James Henry, and all other persons concerned.)

---

[5] The title of the case has been changed to the title that appears on the cover from the old title used by Mr. Oswald, pursuant to a substitution of parties respondent allowed by the Supreme Court of Kansas.

Case No.	*Date Filed*	*Title of Cause of Action*
6273	Oct. 4, 1951	In the Matter of the Application of the Board of the State Fair Managers of Kansas in the Name of the State of Kansas, for the Appointment of Commissioners to Condemn Land for Fairgrounds and Fair Purposes.

(This file shows, by affidavit of D. R. Brown, business manager of The Hutchinson News-Herald, to which affidavit a copy of said publication of "Notice of Meeting of the Commissioners" is attached, that said publication was published only ONE time, namely on the 8th day of October, 1951.

The landowners in this cause of action were Houston L. Whiteside, individually, and Houston L. Whiteside, as Testamentary Trustee.)

Case No.	*Date Filed*	*Title of Cause of Action*
7291	May 16, 1953	In the Matter of the Application of the City of Hutchinson, Kansas, for the Appointment of Commissioners in the Condemnation of Property for the Purpose of Providing the Necessary Right of Way for the Hutchinson Flood Control System.

(This file shows, by affidavit of Drury R. Brown, business manager of The Hutchinson News-Herald, to which affidavit a copy of said publication of "Notice of Condemnation" is attached, that said publication was published only ONE time, namely on the 18th day of May, 1953.

Said "Notice of Condemnation" gives notice to Hal C. Nelson and ——— Nelson, his wife, Anna Q. Nelson

and ——— Nelson, her husband, Minnie B. Obee and ——— Obee, her husband, Ella B. Shive, also known as Ella Shive and ——— Shive, her husband, B. T. Stofer and ——— Stofer, his wife, Opal L. Stofer and ——— Stofer, her husband, Robert L. Jenkins and ——— Jenkins, his wife, O. B. Hester and ——— Hester, his wife, Edith E. James and ——— James, her husband, George D. James and ——— James, his wife, Dorothy Pence and ——— Pence, her husband, Robert Mills and ——— Mills, his wife, Burley V. Bird, Jr. and ——— Bird, his wife, Ray E. Smith and ——— Smith, his wife, Ernest Murphy, Executor of the Estate of Angie E. Chrisman, Deceased, Addie Cole Roland and ——— Roland, her husband, Emy Cole Bailey and ——— Bailey, her husband, Ruth R. Gillispie and ——— Gillispie, her husband, L. Roy Cole and ——— Cole, his wife, Roberta Cole Sewell and ——— Sewell, her husband, Peggy Cole Meyer and ——— Meyer, her husband, Cleo Cole Congdon and ——— Congdon, her husband, Mabel I. Chrisman and ——— Chrisman, her husband, The Unknown Heirs, Devisees, Trustees, Creditors and Assigns, if any, of Angie E. Chrisman, Deceased, Consolidated Gas Utilities Corporation, Howard M. Dukelow, Dan W. Forker and Guy Ankerholz, as The Board of County Commissioners of Reno County, Kansas, and Reno County, Kansas, Frank Banyard as Mayor and S. J. Bontrager, Robert A. Wilbeck, T. J. McAllister, Ralph Williams and Arthur B. Dirks as Councilmen of The City of South Hutchinson, Kansas and The City of South Hutchinson, Kansas, Albert T. Powell, as Trustee, Guy Dyson as Treasurer and Robert Beal as Clerk of Clay Township, Reno County, Kansas, and Clay Township, Fred Brower as Trustee, Joy C. Moore as Treasurer and Hubert Morgan as Clerk of Reno Township, Reno County, Kansas, and Reno Township, The Atchison, Topeka and Santa Fe Railroad Company, The Hutchinson and Southern Railroad Company, Chicago, Rock

Island and Pacific Railroad Company, Guy A. Thompson, Trustee of the Estate of the Missouri Pacific Railroad Company, and his Successor in office, if any, and the Missouri Pacific Railroad Company, The Kansas Power and Light Company, Valley Federal Savings and Loan Association of Hutchinson, The First Federal Savings and Loan Association of Hutchinson, The First National Bank of Hutchinson, Kansas, The Railroad Building Loan and Savings Association of Newton, Kansas, C. K. & N. Railway, United Power and Light Company, Hope Engineering and Supply Company, The Drillers Gas Company, Cities Service Gas Company, The Marine Midland Trust Company of New York and Baldwin Maull as Trustee.)

Case No.	*Date Filed*	*Title of Cause of Action*
8122	Aug. 30, 1954	In the Matter of Condemnation of Land for State Highway Purposes, Hy-Way 50-So—West 4th. 78-K, 5249 (1).

(This file shows, by affidavit of Drury R. Brown, business manager of The Hutchinson News-Herald, to which affidavit a copy of said publication "Publication Notice" is attached, that said publication was published only ONE time, namely on the 3rd day of September, 1954.

Said "Publication Notice" is directed to E. B. Hall and Helen Hall; R. S. Sentney and Ida H. Sentney; R. Clyde Brown; Rollie Ellis; Tony P. Kleis and Ruth E. Kleis; Estate of James Maloney, Deceased, and All of His Unknown Heirs; Mary Maloney; T. J. Lingerfelt and Lucinda Lingerfelt; Chester Stover; Esther Lundsen and 32 other individuals, The Drillers Gas Company and The Federal Land Bank of Wichita, Wichita, Kansas.)

Case No:	*Date Filed*	*Title of Cause of Action*
8221	Oct. 22, 1954	In the Matter of the Application of The Kansas Power & Light Company, a Kansas Corporation, for the Appointment of Appraisers in the Condemnation of Property for the Purpose of Acquiring the Necessary Site and Location for the Construction, Maintenance and Operation of a Sub-station as a Part of and in Connection with its Electrical Distribution System.

(This file shows, by affidavit of Drury R. Brown, business manager of The Hutchinson News-Herald, to which affidavit a copy of said publication "Notice of Condemnation" is attached, that said publication was published only ONE time, namely on the 24th day of October, 1954.

Said "Notice of Condemnation" is directed To Whom It May Concern and To Marjorie Alice Elsz and 11 other individuals and 2 corporations.)

4. That he has likewise examined the court files in the following causes of action, which were filed in the District Court of Harvey County, Kansas, of which Newton is the county seat, on the dates below set forth; that in each case so set forth the only service upon the defendants therein was pursuant to the General Statutes of Kansas (1949), Section 26-202, namely by a single publication in a newspaper which had been duly designated as the official publication for the said city of Newton, Kansas:

Case No.	*Date Filed*	*Title of Cause of Action*
12,965	Oct. 7, 1953	In the Matter of the Condemnation of Certain Private Property in Harvey County, Kansas, for the Purpose of Digging, Drilling or Constructing of Water Wells, Laying, Installing, Maintaining and Operating Pipes, Lines, Mains, Electrical Transmission-Control and Communication Circuits and Other Appurtenances Necessary for the Extending, Constructing, Enlarging and Improving of the Water Supply System and Water Works System of the City of Newton, Kansas.

(This file shows, by affidavit of Jack Lander, general manager of The Newton Kansan, to which affidavit a copy of said publication "Condemning Lands for Extension of Water Works Supply" is attached, that said publication was published only ONE time, namely on the 5th day of October, 1954.

The names of the owners of the tracts taken are not given either in the publication notice or in the Petition. The two tracts—each of eighty (80) acres—are outside the corporate limits of Newton, Kansas.)

Case No.	*Date Filed*	*Title of Cause of Action*
13,131	Feb. 11, 1955	In the Matter of Condemnation of Certain Private Property in Harvey County, Kansas, for the Purpose of Providing Right-of-Way for By-Pass and Right-of-Way for Certain Frontage Roads Necessary in Connection Therewith, Being State Highway Project No. 81-40 in 02-2(8), Harvey County.

(This file shows, by affidavit of Jack Lander, general manager of The Newton Kansan, to which affidavit a copy of said publication "Ordinance No. 1893" is attached, that said publication was published only One time, namely on the 4th day of February, 1955.

The names of the owners of the 9 tracts, some inside the corporate limits of the City of Newton, Kansas, and some outside, are not set forth in either the said publication notice or in the Petition filed therein.)

5. That the causes of action above mentioned are in nowise all of the causes of action which have been filed in either the District Court of Reno County, or Harvey County, Kansas; that the setting forth of a complete list of same would make the record unduly bulky; that to the belief and knowledge of this affiant, these cases were the usual form of notice practice in all cases; that the files show no service of summons on any of said landowners except that by a single publication as above set forth; and that this affiant has made a diligent search of the records, and has made diligent inquiry relative to the practice in this type of case, and firmly believes, and therefore sets it forth as fact, that in none of the above mentioned cases, nor in similar type cases, have the petitioners ever sought any other type of service of summons upon the landowners other than by a single publication notice; that this is true regardless of whether said landowners have been resident or non-resident owners.

Further Affiant Says Not.

s/ A. Lewis Oswald
A. Lewis Oswald
c/o Oswald, Mitchell & Thiessen
119 West Sherman Street
Hutchinson, Kansas

SUBSCRIBED AND SWORN TO before me this 31st day o
October, 1955.

s/ WANDA ALEXANDER
Notary Public

My commission expires Jan. 28, 1957.

(Seal)

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SUPREME COURT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 507

LEE WALKER,

Appellant,

vs.

CITY OF HUTCHINSON, Reno County, Kansas, a municipal corporation, HAL EVERETT, City Manager of said City, JOHN OLSON, Mayor and Member of the City Commission of said City, et al.

On Appeal From the Supreme Court of the State of Kansas

BRIEF OF APPELLANT

A. LEWIS OSWALD,
119 West Sherman Street,
Hutchinson, Kansas,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 507

LEE WALKER,

Appellant,

vs.

CITY OF HUTCHINSON, Reno County, Kansas, a municipal corporation, HAL EVERETT, City Manager of said City, JOHN OLSON, Mayor and Member of the City Commission of said City, et al.

On Appeal From the Supreme Court of the State of Kansas

BRIEF OF APPELLANT

Opinions Below

The opinion of the District Court of Reno County, Kansas, has not been reported. The decision of the Supreme Court of the State of Kansas is reported at 178 Kan. 263, 284 P. 2d 1073. The opinions appear at Tr. 11-20,[1] and Tr. 25-33 respectively.

[1] Such references are to the page numbers in the printed "Transcript of Record" in this Court.

Jurisdiction

The jurisdiction of this Court is invoked pursuant to 28 U. S. C. Sec. 1257(2), since the case involves the question of whether a statute of the State of Kansas, both on its face and as construed and applied, is repugnant to the due process clause of the Fourteenth Amendment to the U. S. Constitution. The judgment or decree sought to be reviewed was dated and entered on June 11, 1955, and is embodied in the aforesaid opinion of the Supreme Court of the State of Kansas, there being no separate order, judgment or decree. An order denying rehearing was dated and entered July 6, 1955. The notice of appeal to this Court was filed in the Supreme Court of the State of Kansas on September 6, 1955. The record and jurisdictional statement were filed in this Court on or before November 4, 1955. This Court noted probable jurisdiction and transferred the case to the summary calendar on January 9, 1956 (Tr. 36, 350 U. S. 930).

Constitutional Provision Involved

U. S. Constitution, Amendment XIV, Section 1:

"* * * nor shall any State deprive any person of * * * property, without due process of law * * *."

Statutory Provision Involved

G. S. Kansas, 1949, 26-202:

"The commissioners appointed by the judge of the district court shall give any owner and any lienholder of record of the property sought to be taken at least ten days' notice in writing of the time and place when and where the damage will be assessed, or by one publication in the official city paper, and at the time fixed by such notice shall, upon actual view, appraise the

value of the lands taken and assess the other damages done to the owners of such property, respectively, by such appropriations."

Questions Presented

1. Whether G. S. 1949, 26-202 of the statutes of Kansas, which permits a city to give notice of the commencement of condemnation proceedings against real property by publication one time in the official city paper, is repugnant to the due process clause of the Fourteenth Amendment of the United State Constitution.

2. Whether the aforesaid statute, when construed and applied to permit condemnations of property without any other notice in a case in which the owner had no actual notice or any reason to know of the contemplated condemnation proceedings, and the aforesaid owner is eighty years of age and has only an education equivalent to the sixth grade, is repugnant to the due process clause of the Fourteenth Amendment of the United States Constitution.

Statement of the Case

Appellant, a resident of the City of Hutchinson, Kansas, filed an amended petition for a permanent injunction against the City of Hutchinson and its various officers in the District Court of Reno County, Kansas. The amended petition (Tr. 1-5) alleged that the plaintiff, an 80-year-old Negro with a sixth grade education, had owned certain real estate for 49 years. It was further alleged that he City of Hutchinson had filed an action for condemnation of said property in the same court against the same property, of which action plaintiff never received any notice through summons or otherwise. The action of the City, the complaint alleged, rested upon its purported power to institute such proceedings by one publication in the official City paper, which said

publication had been had, but plaintiff had never learned of these proceedings until several months after the court action had been concluded. The complaint further alleged that the "single notice so published in the official newspaper was insufficient notice to satisfy the requirements of the Due Process clauses of both Federal and State constitutions" (Tr. 3). The answer admitted that only one such publication had been timely made (Tr. 5-6, 24). The answer claimed that the said notice by publication was sufficient under the due process clause of both the United States and Kansas constitutions (Tr. 6, 24-25). It showed that the said notice of condemnation had been addressed to approximately 33 persons, and that plaintiff's name was 25th on the list.[2] Plaintiff's reply denied the legal conclusion that the statute did not violate the Fourteenth Amendment due process clause (Tr. 10).

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[2] The addressing part of the notice of condemnation read as follows: "To: PATRICK J. O'FARRELL, AGATHA O'FARRELL, JENNIE MUELLER, KENNETH D. GITCHELL, MYRTLE GITCHELL, J. O. GITCHELL, NELLIE B. GITCHELL, EVERETT S. COLE, NINA M. COLE, NELLIE GITCHELL, PEARL D. GRAHAM, THE RAILROAD BUILDING, LAND AND SAVINGS ASSOCIATION, H. K. GORDON, VIRGINIA DEAN GORDON, V. W. COCHRAN, ANITA COCHRAN, ROY FREEMAN, J. W. WOOD, OPAL O. WOOD, FRED W. GILBERT, FERN GILBERT, FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF HUTCHINSON, OBLATE AND COMPANY, LEE WALKER, GLADYS G. WHITFORD, CLAUDE M. REED, ANNA EDNA REED, M. M. HAYS, RUTH J. HAYS, HERBERT K. HARRISON, THERESA R. HARRISON, W. C. WILDE, AND ALL OTHER PERSONS CONCERNED" (Tr. 7). It should be noted that the quoted notice of condemnation appears in Appellant's Abstract (Tr. 7) as part of the answer in the trial court, whereas the Appellee's Abstract does not contain the said notice of condemnation, but instead states that the answer containing the text of the notice was never filed (Tr. 23). The Clerk of this Court has made inquiry as to the reason for the discrepancy and has been advised by counsel for appellant that the answer contained in Appellant's Abstract had been served upon appellant but had never been filed, while the answer contained in Appellee's Abstract had been filed but had never been served upon counsel for appellant. However, the question of whether this notice properly appears in the record herein is immaterial, the notice having appeared in the official paper of Hutchinson, Kansas, with the result that this Court may in any event take judicial notice thereof.

The District Court, in its memorandum opinion, ruled solely on the question of constitutionality, holding that the statute did not violate the due process clause of the Fourteenth Amendment (Tr. 19-20).

The notice of appeal to the Supreme Court of Kansas specified as the sole ground for appeal that plaintiff had been deprived of his property without due process of law (Tr. 22). The Supreme Court of the State of Kansas affirmed the decision below, after discussing federal and state precedents, holding that the statute did not violate the due process clause of the Fourteenth Amendment of the U. S. Constitution (Tr. 33; 178 Kan. at 269, 284 P. 2d at 1077).

Notice of appeal to this Court was filed in the Court below, and this Court noted probable jurisdiction on January 9, 1956. The transcript of record was received by counsel for appellant on February 28, 1956.

Summary of Argument

Appellant, since he was a resident, was entitled by due process of law to personal service in condemnation proceedings rather than service by publication. This Court has previously upheld service by publication only upon non-residents. Even if the condemnation were a legislative taking—which it was not, since the taking was pursuant to judicial procedures—nonetheless a resident must be given personal service, at least to permit him the opportunity for a hearing on the question of damages to be assessed. For this involves a personal judgment, which cannot rest solely upon notice by publication.

Moreover, the more recent cases have abolished the distinction between *in rem* and *in personam* judgments for the purpose of determining what is adequate notice. They have held that a person who can be reached personally with reasonable efforts must be served personally even in *in rem*

proceedings. Since appellant's address was at all times known to appellees, service by publication did not give the appellant due process.

But even if service by publication were constitutionally permissible, notice by merely one publication is so unlikely to reach the addressee that it is not reasonable notice and hence violates due process. It would be fantasy to pretend that the notice given was in any way reasonably calculated to reach all addressees, certainly in the case of an aged and poorly-educated person like appellant, when his name is tucked away amongst numerous others.

ARGUMENT

POINT I

A resident of a state, or a person whose whereabouts can be ascertained with due diligence, is entitled to personal notice of eminent domain proceedings setting the amount of compensation. The notice by publication in this case thus did not comport with due process.

It was long ago held by this Court that service by publication cannot be the basis of a judgment *in personam* against a nonresident. *Pennoyer* v. *Neff*, 95 U. S. 714. But it was then held that since it is "the duty of the owner of real estate who is a nonresident, to take measures that in some way he shall be represented when his property is called into requisition," service by publication upon a nonresident may serve as the basis for an *in rem* judgment (*Huling* v. *Kaw Valley Railway and Improvement Co.*, 130 U. S. 559, 564), though even in such cases service by publication which is arbitrary, oppressive, and unjust violates due process of law (see *Ballard* v. *Hunter*, 204 U. S. 241, 256).

Indeed, as the Court below stated (178 Kan. at 268, 284 P. 2d at 1076), this Court once remarked that taking by

eminent domain is a legislative function, that therefore "an opportunity to be heard in advance need not be given * * *." *Georgia* v. *Chattanooga*, 264 U. S. 472, 483. However, the Court below ignored the key words "*in advance*" which this Court had used. That these words are crucial to the Court's doctrine in the *Georgia* case appears from the language in the opinion following almost immediately, which noted that no complaint was made that the owners did not have "reasonable notice and opportunity to be heard before the final determination of federal questions that may be involved in the condemnation proceedings" (264 U. S. at 483), which questions included "the amount of the compensation" (*Ibid.*)—the very question that appellant here has been foreclosed from raising. This Court later squarely held that "with respect to the compensation for the taking, however, due process requires that the owner be given opportunity to be heard, upon reasonable notice of the pending proceedings." *North Larramie Land Co.* v. *Hoffman*, 268 U. S. 276, 284-5. In the *Hoffman* case, the owner also had a right to go into Court after appraisal for a trial *de novo*.

Appellant does not believe that even a legislative taking can be had without notice and hearing, for even a legislature must afford due process of law. Moreover, the legislature here invoked the aid of the judicial system, and the condemnation herein was pursuant to judicial methods. It was thus a quasi-judicial taking, and certainly the minimum requirement of due process—notice and opportunity for a hearing—was requisite to its validity. But be that as it may, the Court below erred in its constitutional rulings by failing to note that, even in the cases it cited, this Court had never ruled that service by publication upon residents could constitutionally be made by publication, and by failing to note that this Court has always required due notice in that part of condemnation proceedings involving the amount of the award. Thus, reliance of the Court below on the *Georgia* and *Hoffman* cases was misplaced. So, too, the trial Court erred in relying on *Hoffman* and *Ballard*.

The Trial Court similarly erred constitutionally in relying upon *Newman, et al.* v. *Lynchburg Investment Corporation*, 236 U. S. 692 and *Anderson National Bank* v. *Luckett*, 321 U. S. 233. For in the *Newman* case, no question of constitutionality appeared, the sole question re notice being whether the order for the notice followed the statute; and in the *Luckett* case, the only "taking" of property amounted to the substitution of the state for a bank as a depositor's debtor—this Court expressly relied upon the fact that the state held the moneys, without the depositors being deprived of property, when it upheld service by posting. *Id.* at 243.

We think we have demonstrated above that the cases cited by the Kansas Courts are clear authority for the proposition that appellant, a resident, had a right to personal service of notice, that notice by publication was constitutionally deficient. The more recent decisions of this Court, nowheres referred to by the Courts below, also necessitate a reversal of the Kansas Courts, though on a slightly different theory. These later cases do not rely on distinctions between *in rem* and *in personam* judgments or between residents and nonresidents. They more clearly recognize that the question is not the *power* of the state to secure jurisdiction and enforce judgments, but whether the notice and opportunity to be heard were so lacking as to be repugnant to due process of law, whether the notice and opportunity for a hearing were in fact fair under the circumstances.

We refer to *Mullane* v. *The Central Hanover Bank & Trust Co.*, 339 U. S. 306, and *City of New York* v. *New York, N. H. & H. R. Co.*, 344 U. S. 293. The *Mullane* case held that the distinction between actions *in rem* and actions *in personam* was an artificial distinction which did not solve the problem of what was adequate notice under the due process clause of the Fourteenth Amendment. Said this Court:

> "* * * But in any event we think that the requirements of the Fourteenth Amendment to the Federal

> Constitution do not depend upon a classification for which the standards are so elusive and confused generally and which, being primarily for state courts to define, may and do vary from state to state. Without disparaging the usefulness of distinctions between actions *in rem* and those *in personam* in many branches of law, or on other issues, or the reasoning which underlies them, we do not rest the power of the State to resort to constructive service in this proceeding upon how its courts or this Court may regard this historic antithesis. It is sufficient to observe that, whatever the technical definition of its chosen procedure, the interest of each state in providing means to close trusts that exist by the grace of its laws and are administered under the supervision of its courts is so insistent and rooted in custom as to establish beyond doubt the right of its courts to determine the interests of all claimants, resident or nonresident, provided its procedure accords full opportunity to appear and be heard." 339 U. S. at 312-313.

The question in every case is whether the notice given was "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections * * *." *Id.* at 314. This must be done "with due regard for the practicalities and peculiarities of the case * * *." *Ibid.* This opinion was ignored by the courts below.

We submit that the notice in the case at bar was given without any regard for the practicalities or peculiarities of either the individual case or the kind of cases which arise. There is no excuse in reason or law to deprive a citizen resident of a state of some form of actual notice; we have so far been unable to discover any other statute of another state permitting only notice by one publication. While it may be argued that each citizen is charged with the knowledge of the law, and that therefore each and every property owner is charged with a duty of reading the official city newspaper each and every day 365 days a year to see if any proceedings have been begun, it must be pointed out

that in the *Mullane* case the notice given to the individuals effected by publication in a local newspaper was given only after the individuals concerned had been given actual notice of the statute (339 U. S. at 310), and that this Court nonetheless ruled that such publication was not due notice. The publication there was a publication for at least four times (339 U. S. at 309-310). Publication here was given only once. The residence of plaintiff in this case was always known to the defendants; he had always paid his assessments and taxes (Tr. 2). Appellees have nowhere contended that notice given by mail would have been impracticable. Said this Court in *Mullane*:

> "As to known present beneficiaries of known places of residence, however, notice by publication stands on a different footing. Exceptions in the name of necessity do not sweep away the rule that within the limits of practicability notice must be such as is reasonably calculated to reach interested parties. Where the names and post-office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency." *Id.* at 318.
>
> * * * * * *
>
> "The statutory notice to known beneficiaries is inadequate, not because in fact it fails to reach everyone, but because under the circumstances it is not reasonably calculated to reach those who could easily be informed by other means at hand. However it may have been in former times, the mails today are recognized as an efficient and inexpensive means of communication. Moreover, the fact that the trust company has been able to give mailed notice to known beneficiaries at the time the common trust fund was established is persuasive that postal notification at the time of accounting would not seriously burden the plan.
>
> "In some situations the law requires greater precautions in its proceedings than the business world accepts for its own purposes. In few, if any, will it be satisfied with less. Certainly it is instructive, in determining the reasonableness of the impersonal broadcast

notification here used, to ask whether it would satisfy a prudent man of business, counting his pennies but finding it in his interest to convey information to many persons whose names and addresses are in his files. We are not satisfied that it would. Publication may theoretically be available for all the world to see, but it is too much in our day to suppose that each or any individual beneficiary does or could examine all that is published to see if something may be tucked away in it that effects his property interests. We have before indicated in reference to notice by publication that, 'Great caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact.' McDonald v. Mabee, 243 U. S. 90, 91, 61 L. ed. 608, 37 S. Ct. 343. 61 L. Ed. 608, LRA 1917 F. 458." *Id.* at 319-20.

The doctrine of *Mullane* was shortly thereafter reinforced by this Court in the *City of New York* case, where it unanimously held that service by publication upon the City of New York was invalid even in a clearly *in rem* proceeding. Said this Court:

"Notice by publication is a poor and sometimes a hopeless substitute for actual service of notice. Its justification is difficult at best. See Mullane v. Central Hanover Bank & Trust Co., 339 U. S. 306, 70 S. Ct. 652, 94 L. Ed. 865. But when the names, interests and addresses of persons are unknown, plain necessity may cause a resort to publication. See, e. g., Standard Oil Co. v. State of New Jersey, 341 U. S. 428, 71 S. Ct. 822, 95 L. Ed. 1078. The case here is different. No such excuse existed to justify subjecting New York's claims to the hazard of forfeiture arising from 'constructive notice' by newspaper."

* * * * * *

"The statutory command for notice embodies a basic principle of justice—that a reasonable opportunity to be heard must precede judicial denial of a party's

claimed rights. New York City has not been accorded that kind of notice." 344 U. S. at 296, 297.[3]

Here, Lee Walker's address was always known. There was no justification for failing to give him actual service of notice. If it is unlikely that the City of New York, with a well-manned Corporation Counsel's office and thousands of agents, will not actually receive notice by publication, service by publication upon an 80-year-old man with little education is infinitely more unlikely to be effective and hence even harder to justify constitutionality.

The only excuse for procedure of notice by publication, as this Court held in *Mullane,* is that the person cannot be personally reached because his address is not known. This has been the traditional justification behind the whole doctrine of service by publication; it is surely lacking here. The statute applies both to persons whose addresses are known and those unknown. The state has failed to provide any other remedy through which a person who does not receive actual notice could reopen the case. These circumstances so shock the conscience as to amount to a severe violation of due process of law.

POINT II

Even if service by publication were constitutionally permissible, service by only one publication violates due process.

Even when a method of giving notice is constitutionally permissible, its implementation may be violative of due

[3] Still more recently, it has been held that even if a present address is unknown, reasonable efforts must be made to reach a person by mail before service by publication can be justified. *Gillespie* v. *Fort Dodge, D. M. & S. Ry. Co.*, 203 F. 2d 119 (C. A. 8, 1953). In this connection, it should be noted that appellees herein have always resorted to service by publication, despite the statutory alternative of service by mail, without any attempt to determine who are residents or who can be personally served. (Jurisdictional Statement, p. 40.)

process. *Ballard* v. *Hunter*, 204 U. S. 241, 256. Diligent search of the authorities has failed to reveal any decision by any federal court dealing with service by one publication only, nor do any statutes of other states seem to allow such skimpy effort to give actual notice.

Of course, it is impossible to imagine less quantitative notice by publication than one publication. In *Mullane*, it was held by this Court that four publications was not a sufficiently reliable means of giving notice. "Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper * * *." 339 U. S. at 315. Service by one publication cuts down the chance to one-fourth what it was in *Mullane*.

It is too much to expect that every person who owns property for 50 years will examine the legal notices in the official city paper 18,250 times, poring through all the names that are mentioned. Old men with little schooling, like plaintiff, cannot be expected to receive actual notice through this device. The forlorn hope that some friend of the person affected might be such an avid reader of legal notices that he would note this and tell the property owner about it is even more forlorn when only one publication is made. There is no assurance even that a property owner will be able to receive such daily newspaper; the issue of the day might be sold out, and it is too much to expect the property owner to journey to a library to examine each issue, if indeed the library happens to contain the paper.

The opportunities for abuse by the procedures sanctioned below are great. In the case of *Collins et al.* v. *The City of Wichita, Kansas*, No. 392, U. S. Sup. Ct., Oct. Term, 1955, cert. den., 350 U. S. 886, for example, a proceeding was begun in which the landowners appeared, but a new notice of condemnation was printed in the daily paper, which did not come to anyone's attention, and the property stood condemned nonetheless through this second proceeding (Petition, pp. 6-8).

We do not believe that this Court can sanction a procedure under which a person who had enjoyed quiet possession of property for 49 years could be deprived overnight of his property and damages assessed without any actual notice, when his address was on the records of the city, through one publication in a newspaper of his name lumped with many others. If this procedure be countenanced, then divorce actions could be started solely by one publication in a newspaper; legal actions could be begun in the same fashion; and our busy citizenry would be reduced to the status of poring through small type legal notices in our newspapers without any assurance at all that they will receive notice of actions that may be begun against them or their property.

That this case represents the ultimate example of arbitrary procedure in violation of due process of law is seen from an early opinion of this Court delivered by Mr. Justice Holmes, in which just this problem was pointed out. Said this Court: "It was said that, construed as we construe it, the statute would be satisfied if a single publication were made. * * * The answer is that the court fixes the notice and will see that no injustice is done." *Newman v. Lynchburg Invest. Corp.*, 236 U. S. 692, 696. The *reductio ad absurdum* of Mr. Justice Holmes has now come to pass. What he gave as an extreme example of arbitrariness is what the court below upheld as comporting with due process. We believe that the decision below cannot stand, whether it be examined in the light of the dictum of Mr. Justice Holmes, the most recent pronouncements in *Mullane* and *City of New York*, or the cases cited in Point I (*supra*, pp. 6-12).

POINT III

The statute violates due process when construed to apply to an owner who has no notice or any reason to know of the contemplated proceedings, when he is old and has a meager education.

In the *City of New York* case, this Court rejected the contention that since the City of New York knew that proceedings affecting its interests were underway, it was bound to make inquiry as to all judicial proceedings which it knew to be pending, just as this Court in *Mullane* had rejected the notion that persons' property rights could be taken away through service by publication because they had been given specific notice of a statute so permitting.

Lee Walker is not the City of New York. Lee Walker has no Corporation Counsel who can make diligent inquiry into legal notices and pending court proceedings. When these proceedings commenced, Lee Walker was 80 years of age. He has had an education equivalent to the sixth grade only. Unlike the *City of New York*, he had no reason to know that adverse proceedings were ever going to be commenced. Unlike the depositors in *Mullane*, he had no reason to know that some day his property could be taken away without any personal notice. To assume that all property owners must keep eagle eyes posted for legal notices, that if they own land for 50 years they must examine the daily paper 365 times a year for 50 years—more than 18,000 issues—and that they must pore through the scores of names which may be printed in each issue to see if their names appear, is to create a legal fiction—or perhaps a legal fantasy—that cannot be used to sustain the deprivation of property. This Court long ago stated that "Great caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact." *McDonald* v. *Mabee*, 243 U. S. 90, 91. We believe that even greater cau-

tion should be used not to let flights of fancy deny the fair play required by the Fourteenth Amendment.

The long and short of it is that Lee Walker never had notice and never could have reasonably been expected to have received notice by this one publication, and that he could have been reached easily by personal service—even a letter addressed to him at the address of his property would seem to have been sufficient. The statute which leads to such a situation is unconstitutional on its face and as applied.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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Office Supreme Court, U. S.
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HAROLD B. WILEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. ~~507~~. 13

LEE WALKER, *Appellant*,

vs.

CITY OF HUTCHINSON, RENO COUNTY, KANSAS, a Municipal Corporation, HAL EVERETT, City Manager of Said City, JOHN OLSON, Mayor and Member of the City Commission of Said City et al., *Appellees*.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS.

BRIEF OF APPELLEES.

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Winnebago Furniture Manufacturing Company v. Wisconsin Railway Company, 81 Wis. 389, 51 N. W. 576 ..... 10, 11
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OTHER AUTHORITIES CITED

18 Am. Jur. 738 4
18 Am. Jur. 967 5
20 C. J. 938 5
29 C. J. S. 1129 4
29 C. J. S. 1217 5
Lewis on Eminent Domain, Sec. 367 11
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STATUTES CITED

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955.

No. 507.

LEE WALKER, *Appellant*,

vs.

CITY OF HUTCHINSON, RENO COUNTY, KANSAS, a Municipal Corporation, HAL EVERETT, City Manager of Said City, JOHN OLSON, Mayor and Member of the City Commission of Said City et al., *Appellees*.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS.

BRIEF OF APPELLEES.

STATEMENT OF THE CASE.

Appellees controvert that portion of appellant's statement of the case wherein appellant states that the appellees' Answer shows that the Notice of Condemnation had

been addressed to approximately thirty-three persons and that appellant's name was twenty-fifth on the list, since neither appellees' Answer nor appellant's Petition contains a copy of said notice. Appellees are perfectly willing to have the Court consider the said notice as a part of the case, but simply wish to clarify the point that appellant had notice of the contents of appellees' Answer at all times. The only answer ever filed by appellees is shown in the Transcript of Record, at pages 24 and 25, and a copy of the same was mailed to appellant's attorney on October 14, 1954, the same date said Answer was filed in the office of the Clerk of the District Court of Reno County, Kansas. Appellant then filed his Reply on October 19, 1954. Thus, appellant's contention that he was never served with a copy of said Answer is incorrect.

SUMMARY OF ARGUMENT.

Appellant challenges the constitutionality of a statute of Kansas, and since there is a presumption that the statute is constitutionally valid, it must clearly appear to be unconstitutional before it can be declared invalid.

Condemnation proceedings are essentially *in rem* and not *in personam*, and personal notice to the owner, whether he be a resident or non-resident, is not a constitutional prerequisite to the validity of such proceedings. Therefore, a notice by publication is sufficient to satisfy the requirements of due process of law.

Numerous cases have been decided construing statutes similar to the one involved here, and all have held notice by publication in condemnation proceedings to be reasonable and not violative of the due process clause. The very statute involved herein has been construed and held constitutional by the United States Circuit Court in another case and *certiorari* denied in said case by this Court.

ARGUMENT.

POINT I.

A Statute Must Clearly Appear to Be Unconstitutional Before It Can Be Declared Invalid.

Appellant is challenging the constitutionality of the General Statutes of Kansas, 1949, 26-202. This being the case, the invalidity of the statute must clearly appear. A statute should not be held unconstitutional unless it is clear that it does not conform with constitutional provisions, and its invalidity must be manifest. All doubts as to its constitutionality should be resolved in its favor, and this Court must be convinced beyond a reasonable doubt of the unconstitutionality of the statute. The burden of proving such unconstitutionality is upon the appellant in this case. *City of Salina* v. *Missouri Pacific*, 169 Kan. 579, 220 P. 2d 147; *State* v. *Morton*, 158 Kan. 503, 148 P. 2d 760; *Miller* v. *Jackson*, 166 Kan. 141, 199 P. 2d 513; *Board of Education of School District No. 1* v. *Robb*, 168 Kan. 368, 212 P. 2d 306.

POINT II.

Proceedings in Eminent Domain Are in Rem and Not in Personam. Constructive Notice by Publication to a Resident Landowner in Such Proceedings Is Sufficient, and One Notice Published in a Newspaper Ten Days Before Meeting of Commissioners for Assessment of Damages Is Adequate and Meets the Requirements of Due Process.

We turn now to the question of whether or not G. S. 1949, 26-202, violates the due process clauses of the Federal and State Constitutions. In other words, is the notice

precribed by the aforesaid statute sufficient notice in a condemnation proceeding? It is the contention of the appellees that the notice by publication in the official city paper, prescribed by said statute, is sufficient to comply with the constitutional requirements. The pertinent provisions of the said statute read as follows:

> G. S. Kansas, 1949, 26-202. "The commissioners appointed by the judge of the district court shall give any owner and any lienholder of record of the property sought to be taken at least ten days' notice in writing of the time and place when and where the damage will be assessed, or by one publication in the official city paper, and at the time fixed by such notice shall, upon actual view, appraise the value of the lands taken and assess the other damages done to the owners of such property, respectively, by such appropriations."

It is a well-established rule of law that such statutes are constitutional and meet the requirements of due process without personal service of notice, and that proceedings to exercise the right of eminent domain are *in rem* and not *in personam* (29 C. J. S. 1129; 18 Am. Jur. 738; *Todd* v. *Atchinson, Topeka & Santa Fe Railroad Company,* 134 Kan. 459, 7 P. 2d 79).

In Volume 1 of Nichols on Eminent Domain, language in support of such a statute is found at page 339, where it is said:

> "When constructive notice only is required, a posting of the notice upon the land affected, or publication of it in a local newspaper is sufficient."

Again at page 344 is found the following:

> "If a statute provides for sufficient notice to satisfy the Constitution and the proceedings are in accordance with the statute, but the owner does not

> in fact learn of the taking, he is nevertheless charged with notice, and his legal rights are the same as if he had been personally notified."

The same principle is defined in Volume II of McQuillin, Municipal Corporations, at page 531, where it was said:

> "It is obvious that condemnation proceedings are essentially *in rem*, and, therefore, a notice by publication is sufficient to satisfy the requirements of due process of law."

Again at page 549 it is said:

> "It is almost universally held, however, that notice by publication or posting is sufficient, even with respect to persons residing within the jurisdiction where the proceedings are pending."

Finally, the same principle is laid down in 20 C. J. 938:

> "Personal notice to the owner is not a constitutional prerequisite to the validity of condemnation proceedings, and it is competent for the legislature to provide for constructive notice by publication."

(See also Merrill on Notice, Vol. 1, p. 510; Lewis on Eminent Domain, Third Edition, p. 1010, Sec. 568; Randolph on Eminent Domain, p. 306, Sec. 337; 18 Am. Jur., p. 967; and 29 C. J. S., p. 1217.)

In addition, there are numerous decisions from various jurisdictions sustaining the position of the appellees in this case. We will mention only a few of them.

In the case of *Henritzy* v. *Harrison County*, (Miss.) 178 So. 322, the county condemned land without any notice, and published notice in the paper after the condemnation was completed, advising all owners of the land, if they desired compensation for their land, to file claims within thirty days. The Court said:

> "In the case of *Stewart* v. *Hinds County*, 25 Miss. 479, the point was made by the owner of the land that he could not be bound by the condemnation proceedings without being first personally served with notice, he being a resident of the state. But the court held that notice in such case may be either actual or constructive, and particularly so in a case like this (condemnation for highways) which is a proceeding *in rem* and not *in personam.*" * * *. "We believe the present case is strictly a proceeding *in rem*, in which the order of the court is conclusive, whether the party had notice of the proceeding or not."

It can be seen that in the above case the court points out that this is a proceeding *in rem* and not *in personam*, and that as a consequence, constructive notice is sufficient upon either a resident or non-resident. Personal service of notice was not required, and as a matter of fact, unless the owner filed a claim in this case within thirty days, he received nothing whatsoever for his land, and had no notice whatsoever of any meeting of commissioners or intention of the county to appropriate his land.

An eminent domain statute in Missouri required fifteen days' notice for the institution of condemnation proceedings by publication in a newspaper regardless of the residence of the owners. In the case of *Nishnabotna* v. *Drainage District*, (Missouri) 55 S. W. 276, the court upheld the statute, saying:

> "That the legislature had the right to prescribe the manner of giving notice in such cases there can be no question, provided always that it be reasonable."

In the case of *Petet* v. *McClanahan*, (Missouri) 249 S. W. 917, there was a condemnation by the County Court in Missouri. The order of condemnation was published in the newspaper; and, if within twenty days after such

publication no claim for damages was filed in the County Clerk's office, the claims of any owner would be forever barred. The owners were allowed no damages at all if they failed to set up their claim. The court said:

> "Revised Statutes, 1919, Section 10636, permitting the County Court to condemn land for roads and barring claims for damages not filed within twenty days after notice by publication, was not a denial of due process of law by reason of such notice."

In the case of *State of Georgia* v. *City of Chattanooga*, 264 U. S. 472, the court said:

> "Personal service upon the owner is not essential; Publication of notice is sufficient." * * * "Publication of notice is sufficient to give jursdiction in a proceeding under the power of eminent domain to take land for a city street."

In the case of *Newman et al. (Commissioners of District of Columbia)* v. *Lynchburg Investment Corporation*, 236 U. S. 692, it was said:

> "One publication of the notice of condemnation proceedings in each of the three daily papers not less than twenty days before the date fixed for appearance, satisfies the requirements of the court that public notice of not less than twenty days of the institution of such proceedings, be given by advertisement in three daily papers published in the District of Columbia. Twenty distinct publications are not required."

This rule was also approved and followed in the case of *Ballard* v. *Hunter*, 204 U. S. 254.

In the case of *North Laramie Land Co.* v. *Hoffman*, 268 U. S. 276, the United States Supreme Court said:

> "All persons are charged with knowledge of statutory provisions and must take note of procedure

adopted by them, and consequently, statutes providing for condemnation of land may, without violating due process clause, adopt a summary procedure and provide that notice of such proceeding may be indirect."

"It has been uniformly held that statutes providing for taxation or condemnation of land may adopt a procedure, summary in character, and that notice of such proceedings may be indirect."

"The limitation of time provided by the Wyoming statute for filing notice of objection and claim for damages to thirty days after the determination of the Board of County Commissioners to establish a public road does not, on its face, appear to be unreasonable, and is not a denial of due process of law. A like or less period of notice by publication has been repeatedly held by this court to satisfy the constitutional requirements."

It will be seen that in the above case, the landowner receives nothing unless he files a claim for damages within thirty days after the determination of the County Commission that his land should be condemned. Such a proceeding was held by the Court not to be a denial of due process of law. As in the Hoffman case, the Kansas statute also provides that the landowner can appeal, if he is not satisfied with the commissioners' award, within thirty days after the same has been filed in the office of the City Clerk; but in any event the landowner is awarded damages for his land. The pertinent Kansas statute relative to appeal is as follows:

G. S. Kansas, 1949, 26-205. "That any person being or claiming to be the owner of any lands so condemned or appropriated or any lienholder of record, and deeming himself aggrieved by the decision or award of said commissioners, may appeal from their award as to the value of the land, crops, build-

> ings and other improvements thereon, and for all other damages sustained by such person by reason of the appropriating of such lands, by filing with the clerk of the said court, within thirty days after the filing of the decision or award of said commissioners, written notice of appeal, and giving bond for the costs thereof, to be approved by said clerk, and thereupon an action shall be docketed and tried the same as other actions, but said appeal and subsequent proceedings shall only affect the amount of compensation to be allowed, and shall not delay the taking possession, occupation, use or improvement of such lands, upon the paying or depositing the amount so assessed by said commissioners with the city treasurer as aforesaid."

In the Hoffman case, the landowner receives no damages whatsoever unless he files a claim within thirty days, and even such a statute as that was held by the United States Supreme Court to be valid.

Further support of such a statute was given in a recent decision of the United States Supreme Court in the case of *Anderson National Bank* v. *Luckett*, 321 U. S. 233, where the Court held that the requirements of due process of law were satisfied when a notice given bank depositors was posted on the courthouse door. The Court said:

> "All persons having property located within the state and subject to its dominion must take note of its statutes affecting the control or disposition of such property and other procedure which they set up for those purposes (citing authorities). Proceedings for the assessment of taxes, the condemnation of land, the establishment of highways and public improvements affecting landowners are familiar examples."

Other cases holding that notice of condemnation proceedings may be indirect are *Ryan* v. *Housing Authority*

of the City of Newark, 15 Atl. 2647; *Great Northern R. Co. v. Minneapolis*, (Minn.) 161 N. W. 231; *Taylor* v. *Emmet Co. Drainage Dist.*, (Iowa) 148 N. W. 1040; *Wulzen* v. *San Francisco*, (Calif.) 35 Pac. 353.

Appellant argues that service of notice by one publication is insufficient, even though he fails to cite any authority for such contention. The essential requirement in this connection is that the notice be reasonably adapted to the nature of the proceedings and afford the property owner a reasonable opportunity to be heard. No case has been found in which a ten-day notice in an *in rem* action has been held lacking in due process. In those instances where the courts have considered publication notices of ten days or less, they have been approved. Three decisions to such effect are:

Pottock v. *Mellott et al.*, 2 Ter. 361, 22 A. 2d 843, a Delaware case, stating that the posting of notice ten days prior to sale of land for taxes was not a denial of due process.

Tilton v. *Decker*, 171 Cal. 731, 154 Pac. 860, holding the Street Opening Act of California provided due process in requiring a ten-day publication notice to the landowners affected after an assessment of their damages had been written and filed.

Winnebago Furniture Manufacturing Company v. *Wisconsin Railway Company*, 81 Wis. 389, 51 N. W. 576, involved a statute virtually identical with the Kansas statute in its provisions as to notice, and the court held:

"The statute provides that notice may be served personally or at the last and usual abode of such owners and parties interested, not less than five days before such hearing (appointing commissioners), or by publication in some newspaper, to be designated by said court or judge, not less than ten days before the

> date set for hearing such petition. The statute undoubtedly gives the right to give notice in either of the methods specified and by publication on resident as well as non-resident owners. There is no constitutional requirement that we are aware of which prevents notice from being given by publication. Mr. Lewis, in his work on Eminent Domain, Section 367, says, 'In regard to the kind of notice which will satisfy the requirements of the Constitution in proceedings to take land for public use, the authorities almost universally hold that notice by publication or posting is sufficient, even within the jurisdiction where the proceedings are pending.' "

Thus, this Wisconsin statute provided for alternative methods of giving notice either by publication or by personal service, and the Court clearly held in favor of the validity of such a statute, and upheld the ten days' constructive notice on resident owners.

The question of the constitutionality of Section 26-202 has never been presented to the Supreme Court of Kansas, particularly in regard to the matter of notice. Even so, this Court has on many occasions had before it similar questions relating to notice in connection with other condemnation statutes. In the case of *Hunt* v. *Smith*, 9 Kan. 137, the plaintiff alleged that the condemnation proceedings used in appropriating land for a railroad right of way were invalid because of defective notice. At that time, Section 49 of the law required personal notice to be served upon actual occupants of the land, while Section 86 provided for notice by newspaper publication generally. Although the plaintiff alleged he was a resident of the state and in possession of the land, the Court held he was not an actual occupant of the land, and that the service upon him by publication was valid. In its opinion the Court said:

"An owner of land is not in the actual occupancy of the same within the meaning of Section 49 of the act concerning private corporations, unless he is an actual resident thereon; and where such owner is not an actual occupant of the land, notice of the appropriation of a part of the same for a right of way for a railroad given by publication in a newspaper as provided by amended Section 86 of such act, is sufficient."

This same Section 86 was involved in the case of *Missouri River F. S. & G. R. Company* v. *Shepard*, 9 Kan. 647, where a railroad company had condemned certain land owned and occupied by the plaintiff. The plaintiff raised certain technical questions as to the procedure followed by the railroad company, and in the course of its opinion, with reference to notice, the Court said:

"Is the law unconstitutional because providing for no notice? If the law was silent as to notice, and an attempt was made by it to divest one of his property without any pretense of notice, its unconstitutionality would be undisputed. A man cannot be deprived of his property without due process of law. This process of law implies notice; not necessarily actual, personal notice, but notice; such that there is a reasonable probability of the party's receiving it." * * * "Article 9 is not obnoxious to the charge of attempting to divest property without notice. It attempts to provide for notice. It requires notice, gives opportunity to be heard and defend, and right of appeal from the decision of the commissioners to the district court. The real objection, therefore, is that the notice provided for is insufficient. Section 86 of this article reads, that 'before any board of county commissioners shall proceed to lay off any railroad route as herein provided, notice of the time when the same shall be commenced shall be given by publication, thirty days before the time fixed, in some newspaper published in such county,' etc. This does not

> contemplate personal notice. Nor is this essential. As we understand the learned counsel for defendant in error, they concede this. The statutes are full of instances of constructive notice, as in cases of publication against non-residents, in attachment suits, foreclosures of mortgages, etc; or in cases of changes in the valuation of real estate by the boards of equalization; or in the matter of street improvement in cities, or opening roads in the country."

It seems to us that the language employed by the Court in the above case can well be applied in the instant case, and we have found no later decisions of either the Kansas or United States Supreme Court contradicting such language.

This same Section 86 again comes under the scrutiny of the Supreme Court of the United States in the case of *Huling* v. *Kaw Valley Railroad and Improvement Company*, 130 U. S. 559. Even though the landowner in that case was a non-resident of the state, the question involved was the validity of the service as it pertained to such an owner, and the Court, in its opinion, seems to have drawn no distinction between residents and non-residents. With reference to the validity and constitutionality of such publication notice, the Court said:

> "Nor have we any doubt that this form of warning owners of property to appear and defend their interest where it is subject to demands for public use, when authorized by statute, is sufficient to subject the property to the action by the tribunals appointed by proper authority to determine those matters."

Under a statute similar to the one here in question, the Supreme Court of Kansas in the case of *Harrison* v. *Newman et al.*, 71 Kans. 324, 80 Pac. 599, held that notice by publication only is valid and sufficient in condemnation proceedings, the syllabus of the court reading as follows:

> "The notice required by section 160, of the act relating to cities of the first class (Laws 1903, ch. 122) to be given by the appraisers appointed to assess damages and benefits incident to the opening of an alley is a substitute for the notice required by section 161a of the same act to be given by the appraisers appointed to assess damages in condemnation proceedings generally.
>
> A requirement that at least three days' notice in the official city paper shall be given of the meeting of the appraisers in condemnation proceedings is satisfied by the publication of a notice in one issue of such paper nine days before the time set."

The condemnation statute involved in that case merely provided that whenever a city appropriated private property for certain stated purposes, the appraisers shall give at least three days' notice in the official city paper of the time and place of their meeting for the assessment of damages and benefits. The Court held that the condemnation proceeding conducted under said statute was valid, and did not indicate in any way that it felt that such a procedure violated any constitutional requirements.

The statute being questioned herein by appellant has recently been under scrutiny in another case involving the City of Wichita. *Collins et al. v. City of Wichita*, 225 F. 2d 132; No. 392, U. S. S. Ct., Oct. term, 1955, cert. den. 350 U. S. 886. Appellants in that case contended, as does appellant here, that notice by publication in condemnation proceedings did not provide due process, and more particularly that one ten-day notice in a newspaper violates due process. The United States Circuit Court held appellants' contentions to be without merit and unequivocally upheld the constitutionality of the statute involved herein. In the syllabus, the Court stated:

"1. One whose property is sought to be taken from him under the power of eminent domain is entitled to notice and to a hearing with respect to the value of property sought to be so taken and failure to give adequate notice would render such a proceeding void and constitute a lack of due process. U. S. C. A., Const. Amend. 14; 28 U. S. C. A., § 1331.

"2. In condemnation proceedings, property owners whose land is sought to be condemned, need not be served personally with notice of meeting for purpose of fixing damages, and adequate publication of notice is sufficient.

"3. A condemnation proceeding is a proceeding *in rem* and constructive notice meets the requirements of due process. U. S. C. A., Const. Amend. 14, 28 U. S. C. A., § 1331.

* * *

"5. Notice of proceedings for assessment of damages to owners of property sought to be condemned, which was published in newspaper ten days before such proceeding, was adequate and met the requirement of due process. U. S. C. A., Const. Amend. 14; 28 U. S. C. A., § 1331."

Following that decision of the United States Circuit Court in the Collins case, the appellants therein filed Petition for Writ of Certiorari which was properly denied on November 7, 1955, by the United States Supreme Court. Thus, the statute now being challenged has already been determined to be constitutional and valid in every Court, both State and Federal, to which it has been presented for consideration.

CONCLUSION.

The judgment below should be affirmed.

Respectfully submitted,

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